STATE MUSEUM, LUCKNOW
LIBRARY

Acc. No.__________

Book No.__________

348.945

25-9-16

PROVINCIAL MUSEUM LUCKNOW REFERENCE LIBRARY

Supplement to the United Provinces Gazette, Part I, 23rd September, 1916.

JUDICIAL DEPARTMENT.

CIVIL.

NOTIFICATION No. 959/VII—241.

The 15*th September*, 1916.

The following Kumaun Rulings for Civil Courts with Commentary and Indices are published for general information :—

By order of the Hon'ble the Lieut.-Govr., United Provinces,
S. P. O'DONNELL,
Secretary to Government, United Provinces.

KUMAUN RULINGS

FOR

CIVIL COURTS.

Collected and Edited with a Commentary

BY

V. A. STOWELL, I.C.S.

RULINGS.

SECTION I.

HINDU LAW

TABLE OF CASES INCLUDED IN THIS COLLECTION.

I.—HINDU LAW.

Page.

Bachi *v.* Mahenar Singh 27
Bachi Ram *v.* Tarapati 15
Bach Ram *v.* Chanar Singh 1
Budh Singh *v.* Musammat Rangi 39
Chandri *v.* Kalmu 22
Diwanu *v.* Lungi 26
Dulab Singh *v.* Musammat Ganga 45
Fateh Singh *v.* Gabar Singh 47
Ishwari Singh *v.* Jhagar Singh 10
Jamnu *v.* Musammat Manuli 24
Jharu *v.* Durga 20
Karam Singh *v.* Sher Singh 40
Kirpal Singh *v.* Partab Singh 12
Lal Singh *v.* Musammat Sundar 30
Lalu *v.* Musammat Kura 16
Mathura Datt *v.* Musammat Dharam Sundari 18
Nand Ram *v.* Bhajan Datt 1
Narpati *v.* Khimia 36
Nar Singh *v.* Ram Singh 9
Padmu *v.* Shib Datt 3
Padua *v.* Bhawan Singh 7
Rabi Datt *v.* Abhai Ram 5
Radhapati *v.* Har Kishan 11
Ranjit Singh *v.* Pushkar Pal 14
Ratan Singh *v.* Sher Singh 2
Sukhdeo Parshad *v.* Gauri Datt 38
Tila *v.* Bhagat Singh 19
Umraò Singh *v.* Jhagru 23

II.—PRE-EMPTION.

Dat Ram *v.* Raghunathu 61
Gajadhar *v.* Jora 72
Jai Kishan *v.* Maheshanand 69
Joganand *v.* Amba Datt 68
Lachi Negi *v.* Joga 75
Moti *v.* Lal Singh 62
Narain Datt *v.* Bhola Datt 77
Narain Singh *v.* Chanar Singh 70

II.—PRE-EMPTION—*(concluded).*

Page.

Narotam *v.* Rochfort 78
Pan Singh *v.* Dan Singh 67
Parsi Sah *v.* Bijai Ram 55
Parjapati *v.* Kirpal Singh 80
Rabi Datt *v.* Parjapati 74
Roshan Din *v.* Mukim 63

III.—MISCELLANEOUS.

Ambha Datt *v.* Daulat Singh 98
Bachua *v.* Ramua 87
Baga *v.* Ram Singh 110
Dulap Singh *v.* Ram Singh 90
Durga *v.* Jai Singh 92
Durga Singh *v.* Salig Ram 87
Guman Singh *v.* Khushal Singh 94
Jai Kishan *v.* Kirpal Datt 104
Jasodhar *v.* Kamli 89
Kuna Sah *v.* Premua 96
Padamgir *v.* Dulanath 95
Rawal Ganesh Ling *v.* Pandas 105
Musammat Sarda *v.* Lajja Ram 113
Swaru *v.* Bhawanu 93

GENERAL INDEX OF CASES REPORTED.

Page.

Admission. See Hindu Law (Bachi Ram *v.* Tarapati) 15

———. See Hindu Law (Umrao Singh *v.* Jhagru) 23

Adoption. See Hindu Law (Padua *v* Bhawan Singh) 7

Alienation by widow. See Hindu Law (Bach Ram *v.* Chanar Singh) 1

———. See Priestly rights (Musammat Sarda *v.* Lajja Ram) 113

Alienation by father—illegitimate son's claim to control. See Hindu Law (Karam Singh *v.* Sher Singh) 40

Alienation by service tenure holder. See Temple Lands (Amba Datt *v.* Daulat Singh) 98

———. See Temple Lands (Kuna Sah *v.* Premua) 96

———. See Temple Lands (Padamgir *v.* Dulanath) 95

Alienation by mahant. See Temple Lands (Durga Singh *v.* Salig Ram) 87

Almora town—pre-emption in. See Pre-emption (Roshan Din *v.* Mukim) 63

Askot—Rajwar's estate. See Hindu Law (Lala Ranjit Singh *v.* Rajwar Pushar Pal) 14

Brahmans—inheritance of illegitimate sons among. See Hindu Law (Bachi Ram *v.* Tarapati) 15

———. See Hindu Law (Radhapati *v.* Har Kishan) 11

Buildings. See Pre-emption (Jai Kishan *v.* Maheshanand) .. 69

Collaterals—inheritance to. See Hindu Law (Bachi *v.* Mahenar Singh) 27

Common land. See Village Common Land xii

Common waste. See Village Common Land xii

Coparcenary body as reversioners. See Hindu Law (Bach Ram *v.* Chanar Singh) 1

Co-sharer by purchase. See Pre-emption (Moti *v.* Lal Singh) .. 62

Custom—proof of. See Hindu Law (Fateh Singh *v.* Gabar Singh) .. 47

——— and second appeal. See Hindu Law, *Sautia Bant* (Narpati *v.* Khimia) 36

———. See Hindu Law (Rabi Datt *v.* Abhai Ram) .. 5

———. See Hindu Law, *Sautia Bant* (Ratan Singh *v.* Sher Singh) 2

——— of widow asking permission to sell. See Hindu Law (Mathura Datt *v.* Musammat Dharm Sundari) 18

Daughter's inheritance. See Hindu Law (Budh Singh *v.* Musammat Rangi) 39

———. See Hindu Law (Dulab Singh *v.* Musammat Ganga) 45

———. See Hindu Law (Jamnu *v.* Musammat Manuli) 24

Page.

Daughter's inheritance. See Hindu Law (Jharu *v.* Durga) 20

————. See Hindu Law (Lalu *v.* Musammat Kura) .. 16

Extension of cultivation. See Unmeasured Land (Jai Kishan *v.* Kirpal Datt) 104

Gaon Sanjait. See Village Common Land xii

Hindu Law. Adoption—Non-observance of formalities among hill villagers—Levirate—Rights of children begotten on brother's widow.]

Where a Khasia villager Bhawan Singh took to live with him a widow with her son Jasa and treated the latter as his adopted son, though without any of the formalities of adoption prescribed by Hindu Law, it was *held* that Jasa was practically adopted by Bhawan Singh; such adoption is all that takes place in the hills and the formalities required by the Hindu Law are never gone through, except among the inhabitants of large towns and rich people. Bhawan Singh had been the son of his father by the latter's deceased brother's widow and it was further *held* that it is the custom for brothers to take up with the widows of deceased brothers and the children by such a connection are treated as other children of the family so far as outsiders' [rights] are concerned.

Padua *v.* Bhawan Singh and others 7

————. Daughters' inheritance—Gift by widow to daughter and son-in-law—Suit by reversioners—Form of decree.]

Where a Hindu widow gifted certain of her late husband's lands to her daughter and son-in-law jointly and the collateral reversioners sued to set aside the gift, it was *held* by the Commissioner that the parties being pure Rajputs were subject to the ordinary *Mitakshara* Law and the daughter would succeed in preference to collaterals and the suit was dismissed. On reference to the High Court by the Local Government, it was *held* that in view of the fact that the gift was partly to the daughter and partly to the daughter's husband, the suit was maintainable and a decree should be granted declaring that the gift would not bind the plaintiffs beyond the donor's lifetime, but that the daughter, if still alive, would have her rights of inheritance as a daughter on her mother's death.

Dulab Singh and another *v.* Musammat Ganga and others .. 45

————. Inheritance by daughter—Claim by alleged distant relative.]

A person claiming as a distant relative to inherit in preference to a daughter must prove that he is heir by Hindu Law.

Lalu *v.* Musammat Kura 16

————. Inheritance—Daughter's rights among Rajputs.]

Held that among persons of the Gorla Rawat caste, being pure Rajputs, daughters inherit in preference to collaterals.

Budh Singh *v.* Musammat Rangi 39

Page.

Hindu Law. Inheritance—Co-sharer dying without natural heirs—Succession by coparcenary body.]

Where the widow of a co-sharer in a village died leaving no natural heirs, the body of co-sharers of the village (the panch hissadars) were given a decree for the land against defendant, who had managed it on behalf of the last male owner.

Tila *v.* Bhagat Singh and others 19

———. Inheritance—Illegitimate son and daughters.]

When a panda died leaving an illegitimate son by one wife and two legitimate daughters by another wife, the son following the ordinary Hindu Law was held entitled to half a legitimate son's share and the daughters were held entitled to a house said to have been allotted them by their father.

Jharu *v.* Durga and others 20

———. Inheritance—Illegitimate sons of Brahmans—Claim to inherit to collaterals.]

Held that the alleged local custom under which an illegitimate son of a Brahman claimed to succeed to the estate of a collateral of his father was not established.

Radhapati *v.* Har Kishan 11

———. Illegitimate son—Inheritance by such sons among Khasia castes—Claim by such son to control alienation by father during the latter's lifetime.]

Held that though the illegitimate sons of men of Khasia castes in the hills inherit a share of their father's estates on the death of their fathers, yet their rights in the estate only accrue on the death of the father, they cannot claim to control their father in his disposition of the property during his lifetime.

Karam Singh *v.* Sher Singh and another .. 40

———. Inheritance by illegitimate sons of a Brahman—Admission of right by other heirs.]

A village Brahman died leaving one legitimate and three illegitimate sons. The legitimate son, Badri Datt, after contesting in mutation proceedings the joint succession of his half-brothers to the father's landed property, withdrew his objection. On the death of Badri Datt without issue his four first cousins got the whole land recorded in their names; his half-brothers filed this suit for declaration of title. Two of the first cousins had admitted the joint ownership of the illegitimate sons in the mutation proceedings. It was *held* on an appeal by the other two cousins that the illegitimate sons were entitled to their father's and brother's property.

Bachi Ram and another *v.* Tarapati and others .. 15

———. Inheritance—Illegitimate sons—Claim to succeed to collaterals.]

Page.

Held that among families of the inferior *bisht* caste, sons by a *dhanti* wife, though they may succeed to a share in their father's estate, do not inherit to collaterals.

Bachi *v.* Mahenar Singh 27

Hindu Law. Inheritance—Illegitimate son—Admission - Estoppel.]

Where the son by a lawfully married wife had admitted the right of a son by a *dhanti* wife to half the father's estate, and the proprietors had admitted that the latter son was entitled to half the khaikari holding, it was *held* that the latter were estopped from contesting the right of the latter son in a subsequent suit. The court was not prepared, without further inquiry, to accept the general principle that in Garhwal the issue by a *dhanti* wife inherit equally with the issue of a lawful wife.

Umrao Singh and another *v.* Jhagru 23

————. Inheritance—Levirate—Rights of widow—Daughter's inheritance.]

Where the widow of an elder brother lived with the younger brother, it was *held* that after the latter's decease without male issue she was not entitled to a widow's estate in his property but must look to her sons (by the elder brother) for maintenance. *Held,* further, that the daughter of the younger brother (by his lawful wife) was not entitled to inherit his property, which was decreed to the collateral heirs, third brother and nephews.

Jamnu *v.* Musammat Manuli and others .. 24

————. Levirate—Conditions restricting inheritance by offspring of a brother's widow.]

Held that the son of a man by his deceased brother's widow does not inherit his father's estate unless the father has taken the widow to live in his own house and treated her as of his own family.

Kirpal Singh *v.* Partab Singh and others .. 12

————. Inheritance—Claim of *Sautia Bant* (inheritance *per stirpes*) among sons—Evidence to prove such custom.]

Where a Hindu died leaving sons by different wives and the sons by one wife claimed to inherit half the estate by *Sautia Bant,* it was *held* that the usage and common custom in Garhwal follows the usual Hindu Law in favour of *Bhai Bant* (inheritance *per capita*), and that a valid authority must be proved to vary the law in any partcular case.

Rabi Datt *v.* Abdai Ram 5

————. Inheritance—*Sautia Bant.*]

Held that in the absence of a will a partition by *Sautia Bant* (division *per stirpes*) cannot be made by the courts.]

Nand Ram *v.* Bhajan Datt 1

————. Inheritance—*Sautia Bant*—Proof of custom—Second appeal.]

A *Sautia Bant* (inheritance *per stirpes*) was held to be sufficiently proved as a family custom by the lower courts. The Commissioner

Page.

in second appeal disagreed with the lower courts' findings on the evidence and reversed their orders, holding that the fact that the appeal had reference to custom justified a second appeal. On a reference by the Local Government to the High Court, it was *held* that the question whether one custom or another prevailed in a certain family was a question of fact only and the second appeal lay on the point. The Commissioner's order was reversed and that of the first appellate court restored.

Narpati *v.* Khimia and others 36

Hindu Law. Inheritance—*Sautia Bant* among sons--Illegitimate sons.]

In a family of Khas-Rajputs consisting of one legitimate son by a lawfully married wife and four illegitimate sons by a *dhanti* wife, the legitimate son claimed half the father's estate by *Sautia Bant* (division *per stirpes*). *Held* that the custom of the caste was *Bhai Bant* (division *per capita*) and the legitimate son was only entitled to one-fifth of the estate.

Nar Singh *v.* Ram Singh and others 9

————. *Sautia Bant*—Division made by father during his lifetime.]

Where a *Sautia Bant* (division *per stirpes*) among sons was made by a father during his lifetime and found to be corroborated by existing possession, it was upheld by the courts.

Padmu *v.* Shib Datt and others 3

————. Claim of *Sautia Bant* (inheritance *per stirpes*) among sons by different wives—Evidence necessary to prove the alleged custom.]

Held that a written agreement or will or the strongest evidence is necessary to support a claim to *Sautia Bant.*

Ratan Singh *v.* Sher Singh 2

————. *Jethon* (the extra portion of the eldest son)—Arbitration.]

Held that the claim of *Jethon* (the extra portion of the eldest son) must be incontestably proved to be the custom of the individual family concerned.

Ishwari Singh *v.* Jhagar Singh 10

————. Joint holding—Mortgage by one co-sharer—Partition in execution.]

Where a co-sharer in a joint holding mortgaged his share and the mortgagee obtained a decree for foreclosure, and the lower court in execution caused the judgement-debtor's share to be partitioned off and the decree-holder placed in possession of it. On a suit by another co-sharer in the land, this procedure was upheld by the Commissioner.

Chandri *v.* Kalmu and others 22

Page.

Hindu Law. Joint property—Sale of portion by one co-sharer without the consent of the other.]

Where one of two joint Hindu brothers sold his share of the ancestral joint property without the consent of the other, the sale was declared void on the suit of the latter.

Sukhdeo Prasad *v.* Gauri Datt 98

———. Local customs regarding marriage among Rajputs—Inheritance--Proper framing of issues—Evidence necessary to prove local custom.]

Held that among the Bhandari caste of Rajputs a local form of marriage wherein the *Ganeshpuja* ceremony is performed, but the *Saptapadi* and *Phera Bhaura* are not performed is not a lawful marriage, and the son of a woman so married does not inherit; in such cases a clear issue must be framed on the specific point in issue and the party alleging a local custom in variation of the normal Hindu Law regarding marriage must prove clearly that the specific custom set up is followed in the caste to which the parties belong.

Fateh Singh *v.* Gabar Singh.. 47

———. Naik caste—Custom of inheritance -Right of sisters to inherit.]

Held that among the members of the Naik caste sisters inherit their brothers' estates, when the latter die without male issue, in preference to collaterals.

Lal Singh and another *v.* Musammat Sundar .. 30

———. Naik caste -Legitimacy.]

Held that in a community of Naiks it would be superfluous to enter too closely into questions of legitimacy; sons of a man by the same mother should be regarded as heirs to each other.

Diwanu *v.* Lungi 26

———. Rajwar of Askot's estate an impartible taluka—Maintenance.]

Held that the estate of the Rajwar of Askot is an impartible taluka, relatives of the Rajwar are only entitled to maintenance.

Lala Ranjit Singh *v.* Rajwar Pushkar Pal and others .. 14

———. Sale by widow—Local custom of applying for permission to sell.]

Held that the local custom under which widows apply to the District Officer for permission to sell land is only a precautionary measure to prevent litigation and does not debar a subsequent suit by a reversioner.

Mathura Datt *v.* Musammat Dharm Sundari and another .. 18

———. Alienation by widow—Suit by coparcenary body of the village as reversioners.]

Page.

Where the widow of a deceased Hindu, who left no natural heirs, executed a fraudulent deed of sale of his share in the village in favour of the defendant, the sale was set aside on the suit of the body of co-sharers of the village, claiming as reversioners to the heirless estate.

Bach Ram *v.* Chanar Singh and other .. 1

Illegitimate sons. See Hindu Law (inheritance, etc.) passim.

Inheritance. See Hindu Law (passim).

Irrigation channels. See Rights in Water (Baga *v.* Ram Singh).. 110

Jethon. See Hindu Law (Ishwari *v.* Jhagar Singh) 10

Joint holding. See Hindu Law (Chandri *v.* Kalmu) 22

————. Sale of——. See Hindu Law (Sukhdeo Prasad *v.* Gauri Datt) 38

Kedarnath Temple. Right of pandas to enter temple—Right to sue—Distinction between gifts and offerings—Right of pandas to retain gifts.]

Where the *rawal* of Kedarnath had obtained an order of the District Magistrate prohibiting the pandas (the personal priests of the pilgrims) from entering the temple with their clients, and further claimed the right to all gifts made within the temple to the pandas, it was *held* that the *rawal* had no right to deny access to the temple to the pandas, and that the latter were entitled to receive within the temple and retain all gifts made to them by their clients and intended as gifts to them and not as offerings for the temple. The exercise of these rights must be subject to the power of the *rawal* to maintain order and decency in the temple.

Rawal Ganesh Ling *v.* The pandas of Kedarnath .. 105

Khaikars and pre-emption See pre-emption (Narain Singh *v.* Chanar Singh and Pan Singh *v.* Dan Singh) 70, 67

Levirate. See Hindu Law (Jamnu *v.* Musammat Manuli) .. 24

————. See Hindu Law (Kirpal Singh *v.* Partab Singh) .. 12

————. See Hindu Law—Adoption (Padua *v.* Bhawan Singh) .. 7

Maintenance. See Hindu Law—Inheritance (Jamnu *v.* Musammat Manuli) 24

————. See Hindu Law—Rajwar of Askot's estate (Lala Ranjit Singh *v.* Rajwar Pushkar Pal) 14

Marriage. Local customs among Rajputs. See Hindu Law Fateh Singh *v.* Gabar Singh 47

Mawari Bant. See Village common land (Dulap Singh *v.* Ram Singh) 90

Muhammadans. See Pre-emption (Roshan Din *v.* Mukim) .. 68

Naik caste. See Hindu Law (Diwanu *v.* Lungi) 26

————. See Hindu Law (Lal Singh *v.* Musammat Sundar) .. 80

Near relatives and pre-emption. See Pre-emption (Lachi *v.* Joga and other cases) 75

Page.

Non-ancestral land. See pre-emption (Parjapati *v.* Kripal Singh and Narain Datt *v.* Bhola Datt) 80, 77

Non-resident co-sharer. See Pre-emption (Gajadhar *v.* Jora and other cases) 72

Pandas. Rights of——. See Priestly rights of pandas (Musammat Sarda *v.* Lajja Ram) 113

——————. See Kedarnath temple (Rawal Ganesh Ling *v.* Pandas of Kedarnath) 105

Padhanchari land. Claim of rights adverse to the padhan.]

Held that in *padhanchari* land no one can acquire rights adverse to the padhan; each padhan must succeed to it unincumbered.

Bachua *v.* Ramua and others 87

Partition. See Village common land (Dulap Singh *v.* Ram Singh) .. 90

——————. See Village common land (Durga *v.* Jai Singh) .. 92

——————. See Village common land (Jasodhar *v.* Kamli) .. 89

Pre-emption. *Asl* (principal) village and *laga* (hamlet)—Co-sharer in one but not in the other.]

Held that for the purposes of pre-emption the *asl* (principal) village and *laga* (hamlet or offshoot) are one. Where a purchaser of a share in the *laga* was already a co-sharer in the *asl* village, it was *held* that a co-sharer in the *laga* had no right of pre-emption against him.

Dat Ram Pujari *v.* Raghunathu and others .. 61

——————. Buildings.]

Held that, so far as the evidence in this case went, there is no right of pre-emption in Kumaun in respect of houses (as distinct from land).

Jai Kishan and others *v.* Maheshanand and another .. 69

——————. Claim by co-sharer by purchas.]

A co-sharer, who has himself become a co-sharer by purchase, has the same right of pre-emption as any other co-sharer in the village.

Moti Nayal *v.* Lal Singh and another 62

——————. Claim by hissadar against khaikar purchaser.]

Held that a co-sharer in a village has a right of pre-emptiou against a khaikar of the village, who has purchased a proprietary share.

Pan Singh *v.* Dan Singh 67

——————. Claim by near relative not being a co-sharer in the village—History of the custom in Kumaun.]

Held that a near relative of the vendor of a share in a village has no right of pre-emption at all, when such relative is not himself a co-sharer in the village.

Parsi Sah, *v.* Bije Ram and others 55

——————. Claim by near relative of vendor, but not resident co-sharer, against resident co-sharer purchaser.]

Page.

Held that a near relative of the vendor, who was also a co-sharer in the village but was non-resident, had no right of pre-emption against a resident co-sharer who was unrelated to the vendor.

Rabi Datt and others *v.* Parja Pati 74

Pre-emption. Claim by near relative, who was a non-resident co-sharer, against resident co-sharer purchaser—Non-ancestral land.]

Held that the vendor's brother, who was also a co-sharer in the village but was non-resident, was entitled to pre-emption against a purchaser who was a resident co-sharer even in respect of non-ancestral land.

Narain Datt *v.* Bhola Datt and others .. 77

———. Claim by non-resident co-sharer—Record of village customs.]

Held that a non-resident co sharer, who was related to the vendor within the third degree, was entitled to pre-emption against a purchaser who was a resident co-sharer of the village but was not related to the vendor; to keep the family intact is a more important object of the custom of pre-emption than to keep undesirable outsiders out of the village community.

Lachi Negi *v.* Joga and another 75

———. Non-ancestral land—Claim by near relative of vendor and co-sharer in the village but non-resident—Proof of custom.]

Held that in respect of non-ancestral land a near relative of the vendor (within the third degree) who is a co-sharer in the village but is non-resident therein, has no right of pre-emption against a purchaser who is a resident co-sharer, but not a relative of the vendor. A plaintiff seeking pre-emption on the basis of an alleged custom must prove the existence of that custom.

Parjapati Naithani *v.* Kirpal Singh and others .. 80

———. Previous sale under condition reserving right of re-purchase—Claim of pre-emption by near relative of vendor.]

Certain land was sold in 1859 under a condition that in the event of a re-sale the then vendor or his representatives should have the first refusal of the property. Part of the land was sold in 1900 in accordance with this condition to a descendant of the original vendor. The brother of the present vendor claimed pre-emption as a near relative and co-sharer. It was *held* that the contractual stipulation overrode and took priority of the ordinary rights of pre-emption.

Joga Nand and another *v.* Amba Datt and another.. 68

———. Procedure—Claim by hissadar in respect of proprietary right in a khaikari village.]

Held that a co-sharer (hissadar) has a right of pre-emption in respect of the hissadari right in a wholly khaikari village as against a purchaser who is a khaikar of the village.

Narain Singh and another *v.* Chanar Singh .. 70

Page.

Pre-emption. Removal of village to new site granted by Government—Maintenance of former custom.]

Where a village was acquired by Government for a public purpose, and the villagers were given a nayabad grant of State land, to which they transferred themselves and founded a new village, it was *held* that although no record of village customs had been framed, the status of the village remained the same and the old recorded custom of pre-emption should be followed.

Narotam and others *v.* Rochfort and others .. 78

————. Town lots in Almora—Muhammadans—*Shara Muhammadi* not followed by Almora Muhammadans.]

Held that the custom of pre-emption extends to town lots in Almora, that pre-emption can be claimed by a joint co-sharer with the vendor, and that Almora Muhammadans do not observe the legal forms of the *Shara Muhammadi* but follow the local rules applicable to Hindus. The court also expressed the opinion that among local Muhammadans a claim of pre-emption by a near relative as such (not a co-sharer) might also be entertained.

Roshan Din and Ali Bakhsh *v.* Mukim and Lachmi Ballabh .. 63

————. Waiver of claim on previous occasions—Object of the custom—Non-resident co-sharer.]

Failure to claim pre-emption when land is sold on one occasion does not debar a claim in respect of a subsequent sale of the same property.

This follows from a consideration of the object of the custom, viz. to enable co-sharers to exclude undesirable outsiders In view of the wording of the *wajib-ul-arz* in Garhwal, *held* that a non-resident co-sharer has no right of pre-emption.

Gajadhar *v.* Jora and others 72

Priestly rights of Pandas. Gift of right by widow of deceased priest—Suit by body of priests as reversioners—Claim to monopoly of offerings—*Res judicata*—Foreign court.]

A body of priests, the Deoprayagi pandas of Badrinath, receive offerings at the Taptkund pool. On the death of one of them without male heirs his widow executed a deed of gift of his priestly rights in favour of her husband's sister's sons ; the sister had married a man of a different caste and not one of the pandas. The plaintiffs sued as the "panch pandas" of Badrinath, for cancellation of the deed and for an injunction restraining the donees from acting as pandas at Taptkund, on the ground that they (plaintiffs) were reversioners to the estate of the deceased panda, that the rights of a deceased panda who leaves no heir devolve on the panch pandas, and that the body of pandas alone have the right to receive offerings from the pilgrims at Taptkund.

Page.

It was *held* by the High Court that the plaintiffs had failed to prove their alleged reversionary rights, direct or remote, and had also failed to establish their sole right as panch pandas to the receipt of offerings at Taptkund.

It was further *held* by the Commissioner that a decision of the Tehri courts, in a connected case between the same parties, did not constitute the present case *res judicata*.

Musammat Sarda and another *v.* Lajja Ram and others .. 113

Prior user. Local custom of——. See Rights in water .. 110

Rajputs. Daughter's inheritance among——. See Hindu Law (Budh Singh *v.* Musammat Rangi) 39

——. Local customs regarding marriage among——. See Hindu Law (Fateh Singh *v.* Gabar Singh) 47

Rights in water. Irrigation channels—Local customs of prior user.]

Held that the local custom regarding the utilisation of water in the hills depends on the question of prior user. No man may divert or take the water of a stream, if by so doing he interferes with the pre-existing utilisation of such water by another man. Water in the hills is the property of Government and its utilisation is a matter of public policy.

Baga and others *v.* Ram Singh and others 110

Sautia Bant. See Hindu Law—Inheritance (passim).

Service Tenure. See Temple lands (Amba Datt *v.* Daulat Singh) .. 98

——. See Temple lands (Kuna Sah *v.* Premua) .. 96

——. See Temple lands (Padamgir *v.* Dulanath) .. 95

Sisters. Inheritance by——among Naiks. See Hindu Law (Lal Singh *v.* Musammat Sundar) 30

Temple lands. Alienation by mahant—Incumbrance declared void.]

Where a mahant, recorded as proprietor of certain lands assigned to a temple mortgaged part of them, it was *held* that the mortgage was void.

Durga Singh and another *v.* Salig Ram 87

——. Sale by person holding proprietary right on a service tenure.]

In a village assigned to the Hitpanteswar temple Birua, a priest of the temple, was recorded as proprietor of certain land in his capacity as priest, i.e. on a service tenure. He sold this to Kuna Sah, a bania. On a suit by Premua, the son of Birua, who was also a priest, it was *held* that a recorded co-sharer in a muafi village is entitled to do what he likes with his share: the custodians of the temple can sue for the income (*sic!*).

Kuna Sah *v.* Premua Rawal 96

——(*gunth*). Service tenure—Gift by recorded co-sharer—Alleged perversion of endowment—Capacity to alienate.]

In the village of Meldungri, which was assigned to the Brahmari temple, defendant Bachi Singh was recorded as a co-sharer. He gifted half his share to one Amba Datt. Plaintiff alleged that

Page.

the land was held on condition of making offerings and performing certain services for the temple, and that the donor's title was not transferable ; the object of the endowment would be defeated, if alienations were permitted. After an enquiry into the tenure and customs it was *held* that such holders of temple lands could by custom alienate their rights. It was not proved that the conditions of the endowment would be broken by the transfer.

Amba Datt and another *v.* Daulat Singh 98

Temple lands. Service tenure—Sale of person incompetent to perform service.]

In a village held revenue-free as a temple endowment the priests were recorded as co-sharers in consideration of their services at the temple. Where one of them sold part of his land to an outsider, who was not qualified to perform the temple service, it was *held* that the sale was a perversion of temple endowments and was liable to cancellation on the suit of the *pir* or chief priest, or of any worshipper.

Padam Gir *v.* Dulanath and another 95

Temple offerings. See Kedarnath Temple.

Rawal Ganesh Singh *v.* The Pandas of Kedarnath .. 105

Thokdari dues. Claim to enforce lien on such dues in civil courts.]

Held that an obligation against a thokdar secured by a deed on his dues of office cannot be enforced by suit against his heir and successor in office.

Guman Singh *v.* Khushal Singh 94

Unmeasured land. Extension of cultivation by possessory mortgagee—Resultant title.]

Where a possessory mortgagee, being himself also a co-sharer in the village, extended his cultivation of the mortgaged land into adjoining Government waste, *held* that he was entitled to proprietary right in such extensions against the mortgagors.

Jai Kishen and others *v.* Kirpal Datt 104

Village common land. Partition—Division equally by families (*Mawari Bant*).]

The custom known as *Mawari Bant* (partition of the common land equally among all families of co-sharers) was enforced in this case on the basis of the village records and of a precedent order of Mr. Beckett's.

Dulap Singh and others *v.* Ram Singh and others .. 90

——————. Disability of co-sharer to create occupancy (khaikari) right in his share—Partition—Inability of tenant to claim partition against proprietors.]

Page.

A co-sharer in common land cannot create khaikari right in his undivided share of such land; nor can the tenant seeking to enforce such a right claim partition against the joint proprietors.

Durga and others *v.* Jai Singh and another .. . 92

Village common land. Cultivation by majority of shareholders against the will of minority—Inhibitory injunction—Partition.]

Where the majority of the shareholders in village common land had commenced cultivating it against the wish of the minority, and wished to have partition effected, it was *held* on a suit by the minority that common waste land, so long as it is undivided, cannot be brought under cultivation, except with the consent of all the co-sharers, but that partition can be effected on the application of the majority, who can then obtain separate possession of their shares.

Jasodhar and others *v.* Kamli and others 89

———. Waiver of right—Loss of share by dispossession.]

Where a recorded co-sharer in common waste land (measured) allowed the other co-sharers to reclaim and cultivate the whole area and to continue in possession of it for over 12 years without in any way asserting his rights, it was *held* that he had lost all title to his share.

Swaru and another *v.* Bhawanu . .. 93

Village coparcenary body as reversioners. See Hindu Law (Bach Ram *v.* Chanar Singh) 1

———. See Hindu Law—Inheritance (Tila *v.* Bhagat Singh) 19

Widow. Alienation by——. See Hindu Law (Bach Ram *v.* Chanar Singh) 1

——. ———. See Hindu Law (Mathura Datt *v.* Musammat Dharm Sundari) 18

——. Gift by——to daughter and son-in-law. See Hindu Law (Dulab Singh *v.* Musammat Ganga) 45

——. Rights of, levirate. See Hindu Law (Jamnu v. Musammat Manuli) 24

RULINGS.

SECTION I.

HINDU LAW.

Before Sir Henry Ramsay, Commissioner.

NAND RAM OF MAUZA CHANDOLRAI, PATTI NADALSYUN, GARHWAL DISTRICT (APPELLANT) *v.* BHAJAN DATT OF DITTO (RESPONDENT).

[Revenue appeal no. 90 of 1861.]

Hindu Law—Inheritance—Sautia Bant. November

Held that in the absence of a will a partition by *Sautia Bant* (division *per stirpes*) cannot be made by the courts. 23, 1861

THIS is one of the various rulings on the subject of *Sautia Bant* (inheritance or partition *per stirpes* between families by different wives). Sir Henry Ramsay, it appears from the various rulings, only allowed this method of division where a written agreement or settlement or will was proved, or where such division had actually been carried out by the father in his lifetime.

It is unnecessary to detail the facts of the case. The defendants-respondents claimed in a partition proceeding that the partition should be carried out on the basis of *Sautia Bant* alleging this to be the family custom.

ORDER BY SIR HENRY RAMSAY, COMMISSIONER.

In the absence of a will *Sautia Bant* cannot be made by the courts. The division must be *Bhai Bant*. I cancel the deputy collector's order and order a *Bhai Bant*.

Before Sir Henry Ramsay, Commissioner.

BACH RAM KAHLA OF MAUZA SUNSARI, PATTI CHAUTHAN, NAINI TAL DISTRICT (APPELLANT) *v.* CHANAR SINGH AND OTHERS OF DITTO (RESPONDENTS).

[Revenue appeal no. 407 of 1874.]

Hindu Law—Alienation by widow—Suit by co-parcenary body of the village as reversioners. October 6. 1874.

Where the widow of a deceased Hindu, who left no natural heirs, executed a fraudulent deed of sale of his share in the village in favour of the defendants, the sale was set aside on the suit of the body of co-sharers of the village, claiming as reversioners to the heirless estate.

THE facts of the case are sufficiently set out in the heading. The case is reported as an instance of the recognition of the Kumaun custom, whereby the proprietary body of the village (panch hissadars) inherit as reversioners the share of a co-sharer who dies leaving no natural heirs.

ORDER BY SIR HENRY RAMSAY, COMMISSIONER.

I quite agree with the Senior Assistant that the fraudulent deed should not be recognized and I accordingly dismiss the appeal.

Before Sir Henry Ramsay, Commissioner.

RATAN SINGH RAWAT OF MAUZA KIRSAL TAILI, BADALPUR, GARHWAL DISTRICT (APPELLANT-DEFENDANT) v. SHER SINGH OF DITTO (RESPONDENT-PLAINTIFF).

[Revenue appeal no. 91 of 1876.]

August 9, 1876.

Hindu Law—Inheritance—Claim of Sautia Bant *(inheritance* per stirpes*) among sons by different wives—Evidence necessary to prove the alleged custom.*

Held that a written agreement or will or the strongest evidence is necessary to support a claim to *Sautia Bant*.

IN this case (1) Diwan Singh, father of Sher Singh, plaintiff, was the only son of his father by one wife and (2) Ratan Singh and his three brothers were the sons by a second wife.

Sher Singh sued, claiming through his deceased father for half the family estate, alleging that the custom of *Sautia Bant* (inheritance *per stirpes*) obtained in the family. It appeared that at settlement in 1864-65 Diwan Singh had allowed the cultivators of the village Maletha to be recorded as proprietors, but Ratan Singh had sued and recovered the proprietary title to the village. In the course of these proceedings Ratan Singh had stated that he (with his brothers) and Diwan Singh were each entitled to half the village. On the strength of this admission, the lower court decreed Sher Singh's claim to half the family property by *Sautia Bant.* Sir Henry Ramsay reversed this decision.

ORDER BY SIR HENRY RAMSAY, COMMISSIONER.

It appears that with respondent's father's assistance the *asamis* of this village were recorded hissadars at the settlement.

On appellant's filing a regular suit he got a decree for hissadari. Plaintiff now sues for half. I see no reason why he should get half when Ratan Singh rescued the hissadari from the *asamis*, and in the absence of a written agreement or will or the strongest evidence a *Sautia Bant* ought not to be given. I therefore modify the order of the lower court and give plaintiff a decree for *Bhai Bant* or fifth share. Each party will pay their own expenses.

Before Sir Henry Ramsay, Commissioner.

PADMU MAHAR OF GAHAR, PATTI PAIDULSYUN (APPELLANT) *v.* SHIB DATT AND OTHERS OF DITTO (RESPONDENTS).

[Revenue appeal no. 108 of 1877.]

Appeal against an order of P. Bhawani Datt Joshi, Extra Assistant Commissioner, Garhwal, of the 1st June, 1877.

Hindu Law—Inheritance—Sautia Bant—*Division made by father during his lifetime.*

December 5, 1877.

Where a *Sautia Bant* (division *per stirpes*) among sons was made by a father during his lifetime and found to be corroborated by existing possession it was upheld by the courts.

THIS case represents a variation of the custom of *Sautia Bant.* Lal Deo had three wives and during his lifetime he divided up his land, not giving one-third to the offspring of each wife, as is usual in *Sautia Bant,* but allotting half to the one son of his first wife, one-fourth to the two sons of his second wife and one-fourth to the one son of his third wife.

Padmu, one of the sons by the second wife, claimed to inherit one-fourth of the whole estate by *Bhai Bant,* the normal rule, but his suit failed.

The facts further appear from the order of the lower court which isre produced.

ORDER BY P. BHAWANI DATT JOSHI, EXTRA ASSISTANT COMMISSIONER, GARHWAL, DATED JUNE 1, 1877.

Issue.—Has there been any division as alleged by Shib Datt and ought it, if it was ever made, to stand or ought there to be equal partitions into four shares?

Defendant.—Shib Datt in support of [*record torn*] that his father made a partition, files a deed, dated the 29th April, 1868, purporting to be executed by Lal Deo, the father of the parties. According to this instrument he gives to Shib Datt half share of all the land in his name and out of the remaining half he gives half or one-fourth of the whole to his son Ram Datt and the last half or one-fourth of the whole to Padmu (plaintiff) and Jitaroo. The family debts and rents to be liquidated in the same proportion, half by Shib Datt and the remaining half by the other three brothers between them. On testing the existing possession of the parties the court finds them to be as follows:—

			Nalis	a
Shib Datt ...	... $105\frac{11}{16}$ nalis			
Ram Datt ...	... $49\frac{13}{16}$,,	Total	213	0.
Padmu and Jitaroo	... $57\frac{8}{16}$,,			

This will show that Shib Datt's possession extends to double the land occupied by Ram Datt, Padmu and Jitu. Both Padmu and Jitu admit that their father, Lal Deo, in order to prevent his three wives quarrelling, divided land amongst them and the nature of the division thus made proves indirectly the provisions of the deed mentioned above. The deed itself has been attested by three witnesses whose veracity there is no reason to question. The division made by Lal Deo, father of the parties, will therefore be maintained and plaintiff is at liberty to have the land given him and his brother Jitu recorded in their names in the *phant.*

This suit is dismissed with costs.

ORDER BY SIR HENRY RAMSAY, COMMISSIONER.

I dismiss the appeal.

Before Mr. C. A. Daniell, C. S., Senior Member, Board of Revenue.

RABI DATT OF MAUZA KEORALI, GARHWAL DISTRICT (PETITIONER) *v.* ABHAI RAM OF DITTO (OPPOSITE PARTY).

[B. O. no. 1144/II—382, on petition no. 205 of 1885-86.]

July 6, 1886.

Hindu Law—Inheritance—Claim of Sautia Bhant (*inheritance* per stirpes) *among sons—Evidence required to prove such custom.*

Where a Hindu died leaving sons by different wives and the sons by one wife claimed to inherit half the estate by *Sautia Bant*, it was *held* that the usage and common custom in Garhwal follows the usual Hindu Law in favour of *Bhai Bant* (inheritance *per capita*), and that a valid authority must be proved to vary the law in any particular case.

ONE Daya Ram, a Brahman, left eight sons: Abhai Ram and two others by one wife and Rabi Datt and four others by a second wife. Abhai Ram and his brothers claimed to inherit half of Daya Ram's estate by *Sautia Bant*, claiming that their father had during his lifetime carried out a settlement on these lines by a deed of 1873, and that the shares of the sons had been entered accordingly by mutation in the revenue records in 1875. The deed of 1873 however was insufficiently stamped and was unregistered.

The Commissioner decided in favour of the *Sautia Bant*, but the Board in the order reproduced below reversed that decision.

ORDER BY MR. C. A. DANIELL, SENIOR MEMBER.

The appeal was heard to-day before the parties. Two of the appellant's own brothers, Kashi Ram and Narain, and two of the respondent's party, Abhai Ram and Baij Ram, were present. The appellant was also represented by a pleader. It is urged on behalf of the appellant that the Commissioner's decision is against law and usuge among Hindus, and Brahmans in particular, and is against former decisions of the courts in this division. Also that the father could only dispose of property in the manner stated by respondent if the property were self-acquired, and not ancestral.

Also that the partition deed of 1873 is valueless as it is not stamped with the proper stamp and is not registered. Also that the Commissioner admits the evidence for the *Bhai Bant* is a little stronger than that for the *Sautia Bant.* I have had the record read and heard the pleader and parties present.

There seems to me no doubt that the usage and common custom in Garhwal is in accord with the usual law, i.e. that the property would be equally divided between all the sons without regard to whether any of them are sons of one mother or of different mothers (i.e. *Bhai Ban*). The arrangement of *Sautia Bant* set up by Abhai Ram and his two own brothers and apparently consented to by Hari Ram, son of the other wife, appears to be known to [but ?], is made allowable only when there is some special agreement which can legally dispose of the inheritance in that manner. Now in this case there is no legal authority for a departure from the usual law of inheritance. Neither of the lower courts admit the partition paper as evidence as it is palpably inadmissible. The first court decided for the *Bhai Bant* in favour of the present appellant. The Commissioner records a judgement as follows: "The fact of Hari Ram admitting that the *Sautia Bant* was correct is sufficient to turn the scale. The evidence in favour of *Bhai Bant* is very little stronger than the evidence in favour of *Sautia Bant*; so when there it the admission of one interested party that *Sautia Bant* is correct, is must gain the day."

If the evidence of Hari Ram had been taken as proof that there was a special agreement or disposal of property in legal form [his] statement might perhaps be of value, but Hari Ram's admission in the mutation case in 1875-76 is not evidence of any such fact. This admission could be only binding against any claim he himself might make thereafter. It cannot have any effect as to the disposal of the property among his four brothers or as regards their individual rights.

So far as I am able to judge, I do not find that the scale is so closely balanced as Commissioner would consider. I judge that the usual and common custom follows the law and the law must be upheld, unless any valid authority is proved to exist which alters the law in a particular case.

In the present instance, I find no such authority to exist. I would therefore maintain the usual law of inheritance. I grant the appeal and I order that the Commissioner's decree be reversed; and the decree of the court of first instance be reinstated.

The respondent here will have to pay the present appellant's costs in all courts.

Before Mr. H. Ross, Commissioner.

PADUA (APPELLANT) *v.* BHAWAN SINGH AND OTHERS OF MACHOR MALLA, LAKHANPUR (RESPONDENTS).

[First appeal no. 10.]

August 19, 1896.

Hindu Law—Adoption—Non-observance of formalities among hill villagers—Levirate—Rights of children begotten on brother's widow.

Where a Khasia villager, Bhawan Singh, took to live with him a widow with her son Jasa and treated the latter as his adopted son, though without any of the formalities of adoption prescribed by Hindu Law, it was held that Jasa was practically adopted by Bhawan Singh; such adoption is all that takes place in the hills and the formalities required by the Hindu Law are never gone through except among the inhabitants of large towns and rich people. Bhawan Singh had been the son of his father by the latter's deceased brother's widow, and it was further held that it is the custom for brothers to take up with the widows of deceased brothers and the children by such a connection are treated as other children of the family so far as outsiders' (rights) are concerned.

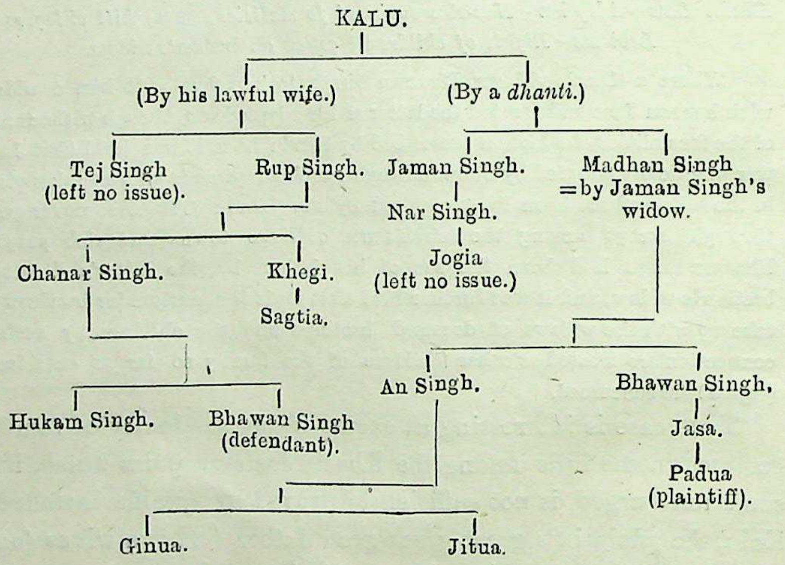
THIS case is interesting as exemplifying the laxity of family customs in the hills among the Khasia castes, a point which, it is sometimes urged, is not sufficiently proved by specific instances. Kalu, the plaintiff's great-great-grandfather, had two wives (one of them, in all probability, though this is not clear on the record, a *dhanti*, not lawfully married). By the second wife he had two sons, Jaman Singh and Madhan Singh, who inherited half his property. On Jaman Singh's death, leaving male issue, his widow was taken to wife following the usual custom by Madhan Singh and bore him two sons, An Singh and Bhawan Singh. Bhawan Singh took to live with him a widow, who had a son Jasa by her former husband; Jasa was treated as his own son by Bhawan Singh, though none of the formalities of adoption were observed. In the present suit Padua, Jasa's son, claimed to inherit the property of Jogia, Jaman Singh's grandson, who died without issue, as against Kalu's descendants by his first wife.

The Commissioner held that Jasa was validly adopted by hill custom and that offspring by a brother's widow were entitled to inherit against more remote collaterals. The family tree and facts of the case will appear more clearly from the lower court's order, which is reproduced. It followed the usual rule of Hindu Law regarding the sons by a brother's widow and was reversed on the basis of local custom.

The lower court's order was as follows (translation) :—

There is no doubt that Jogia is dead, but it is doubtful whether Padua can inherit him or not.

The genealogical table below will give the old history of this family :—


KALU.
(By his lawful wife.)
(By a *dhanti.*)
Tej Singh (left no issue).
Rup Singh.
Jaman Singh.
Madhan Singh =by Jaman Singh's widow.
Nar Singh.
Jogia (left no issue.)
Chanar Singh.
Khegi.
Sagtia.
An Singh.
Bhawan Singh.
Jasa.
Padua (plaintiff).
Hukam Singh.
Bhawan Singh (defendant).
Ginua.
Jitua.

The whole family is divided in two partes—Tej Singh and Rup Singh are sons of Kalu by one wife and Jaman Singh and Madhan Singh by the other.

The plaintiff claims to be descended from Madhan Singh, but on the ground that his father was supposed to be illegitimate, his rights to inherit Jogia's property are objected to. From the evidence recorded in court and the enquiries made in the village, it appeared that after Jaman Singh's death Madhan Singh kept his widow by whom he got two sons—An Singh and Bhawan Singh. Bhawan Singh also kept as his wife a woman who came to him with a son named Jasa, whose father was not known. But Bhawan Singh adopted Jasa as his son. Jasa was, though not formally yet practically Bhawan Singh's adopted son. The plaintiff is the son of this Jasa who died prior to the death of Bhawan Singh. On the death of Bhawan Singh Padua inherited from him.

Padua claims to be legitimate, and in support of this he states that he became heir of his grandfather, Bhawan Singh. In defence the defendants urge that he inherited Bhawan Singh's property on sufferance.

First of all it has to be considered whether Padua is entitled to get a share in Jogia's property. In reply to this I hold that he is not. According to the evidence, I think, no one denies that Padua is not legitimate. But the illegitimate sons can inherit only their father's property under paragraph 467, page 533 of Macnaughten's Hindu Law, volume III, and they cannot claim any right to any other relation's property in the family. According to this law Padua can never be Jogia's heir by reason of his illegitimacy.

I therefore dismiss the plaintiff's suit and direct that the plaintiff will bear defendant's costs.

ORDER BY MR. ROSS, COMMISSIONER.

In this case Jasa was practically adopted by Bhawan Singh. Such adoption is all that takes place in these hills; except amongst the inhabitants of large towns and rich people the formalities required by Hindu Law are never gone through.

It is also quite the custom for brothers to take up with the widows of deceased brothers and the children are treated the same as the other children of the family so far as outsiders are concerned. Bhawan Singh would therefore inherit before distant relations, his adopted son takes his place, and as appellant is the son of the adopted son he should inherit. I therefore accept appeal and direct that Padua, Ginua, and Jitua succeed to Jogia's property. Respondents to bear costs.

Before Mr. H. Ross, Commissioner.

NAR SINGH (APPELLANT-PLAINTIFF) *v.* RAM SINGH AND OTHERS (RESPONDENTS-DEFENDANTS).

[Revenue appeal no. 228 of 1894.]

*Hind Law—Inheritance—*Sautia Bant *among sons—Illegitimate sons.* *September* 15, 1887.

In a family of Khas-Rajputs consisting of one legitimate son by a lawfully married wife and four illegitimate sons by a *dhanti* wife, the legitimate son claimed half the father's estate by *Sautia Bant* (division *per stirpes*) ; it was *held* that the custom of the caste was *Bhai Bant* (division *per capita*) and the legitimate son was only entitled to one-fifth of the estate

THE parties were Khas-Rajputs of the Bhakuni sub-caste. Jit Singh had one son, Nar Singh, by his lawful wife, and four sons, Ram Singh and others, by a *dhanti* wife. Nar Singh claimed half the estate alleging that the custom of *Sautia Bant* prevailed in their caste and, further, that anyhow the other four sons were illegitimate and not entitled to equal shares with him. The lower court found that the custom of *Sautia Bant* was not proved to prevail, and that among the class to which the parties belonged there was no distinction between legitimate and illegitimate sons, both had equal status and equal rights.

The Commissioner agreed with these findings.

ORDER BY MR. H. ROSS, COMMISSIONER.

The evidence is all in favour of *Bhai Bant* and so the order of the lower court is correct. I dismiss appeal with costs.

Before Mr. J. R. Reid, C. S., Commissioner.

ISHWARI SINGH OF MAUZA KOTHAR LOHBA (RESPONDENT-DEFENDANT)
v. JHAGAR SINGH OF DITTO (APPELLANT-PLAINTIFF).

[Case no. A. K. 30 of 1888.]

Hindu Law—Jethon, *the extra portion of the eldest son—Arbitration.*

January 14, 1889.

Held that the claim of *jethon* (the extra portion of the eldest son) must be incontestably proved to be the custom of the individudal family concerned.

IN this case Jhagar Singh as the elder son claimed an extra share consisting of land paying Rs. 9-11-0 revenue, as his *jethon* (birthright). Ishwari Singh, defendant, denied that it was customary in the family to give an extra share to the first born by way of *jethon*. The claim was dismissed by the original court, but on appeal the case was returned by Mr. Reid's predecessor to be decided by arbitration. Plaintiff's arbitrator and the umpire awarded the plaintiff land paying Rs. 5-6-9 revenue as his extra *jethon* share, and this was accepted by the lower court.

On appeal the Commissioner reversed this decision.

ORDER BY MR. J. R. REID, COMMISSIONER.

The following curious points occur in this case :—

(1) The Commissioner, without consulting the parties, ordered the case to be referred to arbitrators. He had no legal right to do so, and the order was illegal.

(2) No provision was made in the order for arbitration for a difference of opinion between the arbitrators and for the disposal of the case should there be a difference of opinion.

(3) The Extra Assistant Commissioner decided that in consequence of the difference of opinion between the arbitrators, the case could not be decided by arbitration. But the award of the majority of the arbitrators (two) seemed fair, and so he accepted it. It is to be noted that both the two arbitrators on one side and the single arbitrator on the other, gave good reasons for the belief that was in them.

The claim of *jethon* must be incontestably proved to be a custom of the individual family concerned ; and going back to the original decision of the Extra Assistant Commissioner there seem very good reasons for distrusting the justice of this claim. I therefore cancel the intermediate proceedings beginning with the Commissioner's illegal reference to arbitration, and uphold the Deputy Commissioner's decision, dated the 13th August, 1887. All costs on respondent.

Before Colonel G. E. Erskine, Commissioner.

RADHAPATI CHIMWAL OF MAUZA PAJAINA, KANDARKHUWA, NAINI TAL DISTRICT (APPELLANT) *v.* HAR KISHAN CHIMWAL OF DITTO (RESPONDENT).

[Civil appeal no. 34 of 1890.]

July 24, 1890.

Appeal against an order of Mr. J. Oakshott, I.C.S., Assistant Commissioner, Naini Tal, dated the 11th September, 1889.

Hindu Law—Inheritance—Illegitimate sons of Brahmans—Claim to inherit to Collaterals.

Held that the alleged local custom under which an illegitimate son of a Brahman claimed to succeed to the estate of a collateral of his father was not established.

THIS is one of the numerous cases relating to succession by the sons of *dhanti* wives. The parties were Hari Kishan, plaintiff, legitimate son of Tarapati and Radhapati, defendant, son by a *dhanti* wife of Bamdeo, the brother of Tarapati. The property in dispute between them was that of Kishna, a first cousin of their respective fathers. The parties were village (cultivating) Brahmans.

The defendant contended that in their caste there was no distinction as regards inheritance between a legitimate and an illegitimate son. On a remand enquiry it was reported that he had failed to prove this alleged custom as regards collaterals. It may be noted however that the Assistant Commissioner (Mr. Oakshott's) report refers to evidence showing that "the sons of a *dhanti* wife succeed to their father—a principle which is not denied by the respondents."

ORDERS BY COLONEL G. E. ERSKINE, COMMISSIONER.

The appellant alleges that by the custom in Kumaun the offspring of Brahmans by *dhanti* wives succeed to the estate of the collaterals of their father. He may be allowed the opportunity of proving the existence of a local custom such as he alleges, whereby the ordinary Hindu Law is varied. The case is remanded to the lower court for enquiry and a finding on this issue. The papers will be returned to this court for final disposal of the appeal.—*6th January*, 1890.

I concur with the lower court that no such custom as alleged by appellant is proved to exist in Kumaun. Consequently I dismiss the appeal with costs.—*24th July*, 1890.

Before Mr. F. Giles, I.C.S., Commissioner.

KIRPAL SINGH DHARKOTI, MAUZA PARKANDI (APPELLANT-PLAINTIFF)
v. PARTAB SINGH, MUSAMMAT PARBATI, MOTHER OF UMRAO
SINGH AND MUSAMMAT GAURA, MOTHER OF JITU
(RESPONDENTS-DEFENDANTS).

[Revenue regular appeal no. 69 of 1890.]

Appeal against an order of Pandit Dharmanand Joshi, Deputy Collector, dated the 6th June, 1890.

May 18, 1891.

Hindu Law—Levirate—Conditions restricting inheritance by off spring of a brother's widow.

Held that the son of a man by his deceased brother's widow does not inherit his father's estate, unless the father has taken the widow to live in his own house and treated her as of his own family.

THE facts of this case illustrate in a curious way the prevalence of the levirate custom in the hills.

There were three brothers, Parju, Tejua and Chawanu. Parju died without issue and the second brother, Tejua, took Parju's widow to live with him. Tejua had one son, Maugal Singh, by his own wife and one son, Bagolia, by his brother Parju's widow. Tejua then died and the third brother, Chawanu, formed a similar connection with Tejua's widow. Chawanu had one son, Partab Singh, defendant, by his own wife, and one son, Kirpal Singh, plaintiff, by Tejua's widow. The other parties to the suit were the widows of the two sons of Tejua representing their minor sons. The plaintiff alleged that one-half of the family estate belonged to himself and his half brother, Partab Singh, through their father, Chawanu, and claimed title and possession in a half share of this half.

The lower court found that plaintiff was the son of Chawanu; that by local custom, if the elder brother's widow went to live in the younger brother's house as his wife, her children by him were considered legitimate and inherited as such, but that if the widow continued to live in her former husband's house, she was regarded as only a concubine of the younger brother and her issue by him as illegitimate, and that in this case the plaintiff's mother had never gone to live with Chawanu as his wife, but had continued to live in Tejua's house looking after Mangal Singh, her son by Tejua. Plaintiff was accordingly held to be illegitimate and not entitled to a share in his father Chawanu's estate.

From this order the plaintiff appealed to the Commissioner. The parties were Khasias.

ORDER BY MR. F. GILES, COMMISSIONER.

The first plea of appeal breaks entirely new ground—throughout the proceedings no mention has been made by appellant (plaintiff) of any partition by his father. He has claimed throughout as heir.

He does not dispute the existence of the custom mentioned by both the deputy collectors that a son of a man by his brother's widow does not become his heir unless he has taken the mother into his house and treated her as of his family.

The simple question is then, was appellant's mother so treated by his father?

After careful perusal of the record I see no reason to doubt the justness of the lower court's conclusion that she was not so treated. The appeal must therefore be dismissed with costs.

Before Mr. D. T. Roberts, C. S., Commissioner.

LALA RANJIT SINGH RAJWAR M. DEWAL (APPELLANT-PLAINTIFF)
v. RAJWAR PUSHKAR PAL, GOVIND SINGH, PARBIN SINGH,
DURYODHAN SINGH AND OTHERS (RESPONDENTS-DEFENDANTS).

[Regular revenue appeal no. 26 of 1890-91.]

Appeal against an order of Colonel G. E. Reade, Junior Assistant Commissioner, Kumaun, dated the 1st December, 1890.

August 11, 1891.

Rajwar of Askot's estate an impartible taluka—Hindu Law—Maintenance.

Held that the estate of the Rajwar of Askote is an impartible taluka; relatives of the Rajwar are only entitled to maintenance.

THE plaintiff in this case claimed a declaration of his title to a one-fourth share in the Askot estate and three years' arrears of mesne profits, stating that he intended to get partition of his share. Many earlier decisions and records were produced and the courts followed a decision of Mr. Beckett, Settlement Officer of 1870.

Mr. Man for appellants; and *Pandit Hari Ram* for respondents.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

The claim is one for partition of a specified share in taluka Askot, but the written evidence filed and the settlement reports and correspondence with Government show that this taluka is held solely by the Rajwar for the time being, and that his relatives have no specific share in the estate but only a right for maintenance. Several passages in the appeal practically admit this position and there is no evidence to the contrary.

I therefore agree with the lower court that the application to divide off a specific portion of the taluka as the share of plaintiffs cannot be allowed. The appeal is dismissed with costs.

Before Mr. F. Giles, C.S., Offg. Commissioner.

BACHI RAM AND GANGA DATT LOHANI, MAUZA BHETA (APPELLANTS-DEFENDANTS) *v.* TARA PATI, KHIMA AND RAM KRISHAN (RESPONDENTS-PLAINTIFFS).

August 14, 1891.

Hindu Law—Inheritance by illegitimate sons of a Brahman—Admission of right by other heirs.

A village Brahman died leaving one legitimate and three illegitimate sons. The legitimate sons, Badri Datt, after contesting in mutation the joint succession of his half-brothers to the father's landed property, withdrew his objection.

On the death of Badri Datt without issue his four first cousins got the whole land recorded in their names; his half-brothers filed this suit for declaration of title. Two of the first cousins had admitted the joint ownership of the illegitimate sons in the mutation proceedings. It was *held,* on an appeal by the two other cousins, that the illegitimate sons were entitled to their father's and brother's property. The Board of Revenue upheld this order on second appeal.

THE facts of the case appear sufficiently from the judgement. The parties were the members of Lohani sub-caste of village Brahmans. It is not very clear how far the Commissioner recognised the custom of inheritance by illegitimate sons by a *dhanti* woman or whether he considered the admission of their right by their half-brother and two of the cousins to operate as an estoppel of the claim of the other cousins. The case illustrates the admission among the people themselves of the custom of inheritance by illegitimate sons among Brahman villagers.

ORDER BY MR. F. GILES, OFFG. COMMISSIONER.

Madhap and Gauri Datt on the 12th November, 1887, both deposed that Tarapati and Badri were in joint possession of the land.

This was on the occasion of Badri Datt's objecting to entry of Tarapati and his brothers jointly with himself. The case is now clear.

Gopi had a legitimate son, Badri Datt, and illegitimate sons, Tarapati, etc.

Badri Datt is now dead. During his lifetime he objected, while a minor, to entry of his half-brothers, Tarapati, etc., jointly with himself for their father Gopi's land.

Badri Datt had four first cousins—Gauri Datt, Madhap, Ganga Datt and Bach Ram. On the occasion of Badri Datt's objection two of these cousins, Gauri Datt and Madhap, supported Tarapati and his brothers saying that they cultivated in joint ownership with Badri Datt. Subsequently Badri Datt withdrew his objection and the names of Tarapati, etc., were entered with his own. When Badri Datt died the four cousins got the land recorded to them and Tarapati, etc., sued them for declaration of right. The lower court gave Tarapati, etc , a decree.

It seems clear that this decree must be upheld. Tarapati, etc., were recognized as joint proprietors with Badri Datt on the statement of two of the cousins who now declare that they have no right. The appeal must be dismissed with costs.

ORDER OF THE BOARD OF REVENUE.

With reference to his no. 485/II—13, dated the 5th December, 1891, and enclosures (herewith returned), states that the appeal has been dismissed with costs on the appellant by the Senior Member.

Before Mr. D. T. Roberts, I.C.S., Commissioner.

LALU BURHAKOTI, MAUZA TALLI KOLRI (APPELLANT-DEFENDANT) *v.*
MUSAMMAT KURA OF GAUTAM (RESPONDENT-PLAINTIFF).
[Revenue regular appeal no. 44 of 1891-92.]

Appeal against an order of Pandit Manik Lal Joshi, Deputy Collector, Garhwal, dated the 17th February, 1892.

May 3, 1892. *Hindu Law—Inheritance by daughter—Claim by alleged distant relative.*

A person claiming as a distant relative to inherit in preference to a daughter must prove that he is heir by Hindu Law.

THE facts of the case appear sufficiently from the judgement. It may appear superfluous to reproduce this ruling, but in view of the alleged local custom, which is constantly asserted in such cases, that daughters and their descendants are completely excluded from inheritance in the hills, the judgement is not without significance. Mr. Pauw remarks that the right of the daughter to succeed even in preference to unrelated co-sharers in the village is not generally recognized by the people themselves; and at a meeting of Kumaun pandits held at Almora in connection with the compilation of this digest and commentary, no less than 13 out of 16 present urged the retention of the old principle of the complete exclusion of females and their descendants from the line of succession, alleging that the ordinary Hindu Law on this point was entirely unknown in the hills, and that rulings introducing the principles of Hindi Law were still never followed by the higher classes. The courts must therefore expect to find instances where it is contended that the daughter is not an heir at all by local custom. In this case Lalu was a co-sharer in the village and of the same caste as the deceased co-sharer and probably a distant relative.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

Parties present.

This is a suit to cancel a mutation of names which the defendant Lalu had got made in his favour in succession of Lalmani and is brought by Kura, the daughter of Lalmani.

It appears that after Lalmani's death a dispute arose in 1870 A.D. between his half-brother, Jeura, and his widow, Musammat Lalde, and this was settled by Colonel Garstin in accordance with a deed made by the parties of which the effect was that Jeura and Musammat Lalde should hold the property on behalf of the two daughters of Lalmani. One of these daughters is dead and the other is Musammat Kura, the plaintiff in the present case.

In that case Lalu did not intervene or put forward any claim, and he says he did not do this until the death of Musammat Lalde last year. Jeura had died long previously.

It is thus clear that the property is in possession of Musammat Kura who can only be ousted by some one with a better claim and by a regular civil suit. The mutation of names was incorrectly made and was not made on the basis of possession. Considered as a revenue suit this settles the matter, but the lower court has also taken up the civil claim, and on this also has decided against Lalu.

Obviously it is for Lalu to prove that he is heir by Hindu Law to Lalmani and this he has failed to do. His pedigree is not proved by any evidence and on his own showing he is at least seven degrees removed in relationship from Lalmani.

As Lalu's claim has broken down, because he has proved nothing except that he is of the same caste as the deceased Lalmani, it is unnecessary to go further and decide the general question as to under what circumstances and with what limitations Musammat Kura as daughter of Lalmani is entitled to inherit. It is sufficient for the present suit that Lalu, who endeavours to oust her, has no claim on his own account.

The appeal must therefore be dismissed with costs.

Before Mr. D. T. Roberts, C. S., Commissioner.

MATHURA DATT GURANI, ALMORA (APPELLANT-PLAINTIFF) *v.* (1) MUSAMMAT DHARAM SUNDARI, VENDOR, AND (2) SHEIKH KULLEN, VENDEE (RESPONDENTS-DEFENDANTS).

[Civil appeal no. 5 of 1892].

Appeal against an order of Colonel G. E. Reade, Assistant Commissioner, Almora, dated the 7th June, 1891.

July 21, 1892.

Hindu Law—Sale by widow—Local custom of applying for permission to sell.

Held that the local custom under which widows apply to the district officer for permission to sell is only a precautionary measure to prevent litigation and does not debar a subsequent suit by a reversioner.

THE facts are sufficiently clear from the court's order. The custom is now obsolete, or practically so, but it is possible that instances of it and pleadings based on it may come before the courts still.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

This is a suit to cancel a sale by a widow who under Hindu Law has only a life interest in the property sold. In accordance with a custom apparently peculiar to Kumaun, application was made for permission to the Senior Assistant Commissioner to sell, and after a summary enquiry by the tahsildar permission was given, and the contention is that this permission disposes of the case, but the evidence filed relating to this custom shows that it is only a precautionary measure to prevent litigation, and the permission given only extends to sale of property to pay debts already incurred and for payment of which there is no other resource. The custom does not invalidate ordinary Hindu Law but is a matter of executive usage. It remains open to parties interested to raise, by regular suit, the question whether that permission was properly given. Now in the present case the application for permission only represented debts of Rs. 100 and the sale is for Rs. 600, that is to say, far in excess of the actual necessities of the case and it is only in case of necessity that permission is given up to the extent of that necessity.

In the second place the widow on the summary enquiry was represented as *la-waris* (having no heir) but it is now admitted that the appellant is her heir and will succeed her in ordinary course. I therefore find that the widow had no right to sell more than her life interest in the property, and I grant the appeal declaring the sale null and void as far as the appellant is concerned, that is to say, the sale is only a valid conveyance for the lifetime of the widow (vendor) and after her death the property reverts to her heir. Respondent to pay costs.

Before Mr. D. T. Roberts, C.S., Commissioner.

TILA BAGURI OF MAUZA MOHANARI, ALMORA DISTRICT (APPELLANT) *v.*
BHAGAT SINGH, CHATURA AND OTHERS (RESPONDENTS).

[Revenue regular appeal no. 13 of 1891-92.]

Appeal against order of Mr. H. E. Holme, Assistant Commissioner, Almora, dated the 25th November, 1891.

May 11, 1892.

Hindu Law—Inheritance—Co-sharer dying without natural heirs—Succession of village co-parcenary body.

Where the widow of a co-sharer in a village died leaving no natural heirs, the body of co-sharers of the village (the panch hissedars) were given a decree for the land against defendant, who had managed it on behalf of the widow of the last male owner.

THE facts of the case appear sufficiently from the order of the lower court, which is reproduced below. The case exemplifies the custom whereby in Kumaun the co-sharers of a village are reversionary heirs to the share of a co-sharer, who dies leaving no natural heirs. The village as a unit is settled by Government with the whole body of co-sharers, who are jointly and severally responsible for the whole revenue assessment, and this reversionary right follows as a corollary from this arrangement.

The order of the lower court (Mr. H. E. Holme, Assistant Commissioner) was as follows :—

Plaintiffs, the sharers in mauza Mohanari, sue defendant for wrongfully having certain land in that village entered in his own name. The land in question belonged to one Ramauti, who died leaving no heirs. Plaintiffs claim that it reverts to them jointly as the co-sharers of the village. Defendant rests his title to the land on *possession* and a decision of the late sadr amin. This decision however on being inspected turns out to be merely a permission to defendant's brother to manage

Ramauti's estates during her lifetime, provided her heir, a certain sepoy, gave his consent thereto: this sepoy was however apparently never heard of again. With regard to the question of possession, on the present date to which the suit has been adjourned after the framing of issues, plaintiffs produce three witnesses to their possession while defendant makes default. Judgement for plaintiffs with costs.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

Appellant present.

I concur with the lower court that the appellant has no right to this land. Appeal dismissed with costs.

Before Mr. D. T. Roberts, C.S., Commissioner.

JHARU PANDA OF MAUZA DIULI, GARHWAL (APPELLANT-PLAINTIFF) *v.*
DURGA AND NATHU PANDAS AND MUSAMMAT BASANTI AND
MUSAMMAT RAJI OF DITTO (RESPONDENTS-DEFENDANTS).

[Special civil appeal no. 1 of 1893.]

February 11, 1893.

Hindu Law—Inheritance—Illegitimate son and daughters.

Where a Panda died leaving an illegitimate son by one wife and two legitimate daughters by another wife, the son following the ordinary Hindu Law was held entitled to half a legitimate son's share and the daughters were held entitled to a house said to have been allotted them by their father.

THE parties to this case were pandas, who are the personal priests of pilgrims to Kedarnath and are not of genuine Brahman caste. The facts appear from the lower court's report on remand The case is only worth noting as applying the ordinary rule of Hindu Law to the inheritance of an illegitimate son and to that of daughters, who are commonly excluded from inheritance by the local custom of the hills.

It appears however from the record that no plea was raised or enquiry made regarding local custom in this case, and the Commissioner's order, it will be seen, laid down no definite ruling.

The deputy collector's remand report was as follows:— "This case was remanded for further enquiry and the issues were—

(i) in whose possession is the house in dispute at the present time?

(ii) if it is not in plaintiff-appellant's possession, is he entitled or not to be given possession at once?

(iii) to whom does the house in question belong at the present time?

1st issue.—To arrive at a satisfactory finding on the issue I went to mauza Diuli where the disputed house is situated, in person, and there out of a good number of persons collected at a distance from court, selected five men, aged and respectable, at random, with a view to examine them on the subject in hand. These were accepted by the parties. They unanimously state that the house in question, since the girls' mother, Musammat Kali, was married to Pate Ram, had been in her possession without interruption, and that after her demise the girls have been occupying it.

2nd issue.—The house is not in appellant Jharu's possession. His illegitimacy has not only been established by the evidence accepted by the parties, but Jharu himself has in his sworn statement of the 11th February last admitted that his mother was illegitimate. Where there is no legitimate male issue, but only daughters, as in this case, the illegitimate son is entitled to half of the share of a son, and Jharu cannot therefore obtain possession of the house in question, because he has more than his share in mauza Paturi in his possession (Dattaka Chandrika, sections 31 and 32 and Mr. Macnaughten's work, page 18). Further, being on account of his illegitimacy not in a position to offer spiritual benefits to his father, he cannot inherit the whole of Pate Ram's estate, so long as his legitimate daughters, Basanti and Raji, who exclude him from it, are alive (Dattaka Chandrika, sections 31 and 32, and Mr. Macnaughten's work, page 18). Moreover, the evidence accepted by the parties tacitly goes to show that Pate Ram had, while living, made a division of his property, by which the house in dispute fell to the share of Musammat Kali—the mother of the girls—Basanti and Raji, and Paturi where he had a house and Rs. 4 revenue paying land, went to his remaining two wives. The house in Diuli being thus the property of Musammat Kali, cannot go to Jharu's mother.

3rd issue.—The foregoing shows that the house at present belongs to Pate Ram's legitimate daughters, Basanti and Raji."

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

I see no sufficient reason for admitting a special appeal. Rejected.

Before Mr. D. T. Roberts, C.S., Commissioner.

CHANDRI OF MAUZA MUCHYALGAON, PATTI PAINON, GARHWAL DISTRICT (APPELLANT-DEFENDANT) *v.* KALMU, NAGOLIA AND SHIB DATT OF MAUZA JASKOT, PATTI PAINON, GARHWAL DISTRICT (RESPONDENTS-PLAINTIFFS).

[Revenue miscellaneous appeal no. 27 of 1892-93.]

Appeal against an order of Pandit Manik Lal Joshi, Deputy Collector, Garhwal, dated the 6th January, 1893.

April 28, 1893.

Joint holding—Mortgage by one co-sharer—Partition in execution.

Where a co-sharer in a joint holding mortgaged his share and the mortgagee obtained a decree for foreclosure, and the lower court in execution caused the judgement-debtor's share to be partitioned off and the decree-holder placed in possession of it, on a suit by another co-sharer in the land, this procedure was upheld by the Commissioner.

IN this case Shib Datt mortgaged his share in an undivided family holding to Kalmu. On the latter's obtaining a decree for foreclosure and applying for execution in default of payment, the lower court ascertained that Shib Datt's share amounted to $23\frac{9}{16}$ nalis and deputed an amin to draw up a partition list containing this area with proper proportions of the various qualities of land: the list made was approved by the court.

Chandri, cousin of Shib Datt, objected and then appealed, alleging that this land really belonged to him. The case is reported with reference to the custom of a co-sharer's ability to alienate his joint share in a family estate without reference to his joint co-sharers, and also as illustrating the informal procedure, which used to be customary in such cases in Kumaun. The joint holders in this case however were evidently not a joint Hindu family.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

Parties present.

This case has been rather difficult to understand. The respondent in execution of a decree has been put into possession of

23 nalis odd—being the share of Shib Datt, his judgement-debtor out of a total of 119 nalis. This is in accordance with an amendment of the *phant* made by Shib Datt and his co-sharers—whereby they re-arranged their holdings and whereas the whole 119 nalis was formerly recorded to Kallia (the objector's father) 23 nalis out of it passed to the share of Shib Datt. The objector says he is still in possession, and that this transfer never in fact took place. But as Shib Datt's right to this area is unquestionable and as the lower court has made a partition of the whole 119 nalis, I see no objection to possession being delivered to Shib Datt's creditor. The appeal is dismissed with costs.

Before Colonel G. E. Erskine, Commissioner.

UMRAO SINGH AND KIRPAL SINGH, MAUZA NAGRASU (APPELLANTS-PLAINTIFFS) *v.* JHAGRU (RESPONDENT-DEFENDANT).

March 13, 1894.

Hindu Law—Inheritance—Illegitimate son—Admission—Estoppel.

Where the son by a lawfully married wife had admitted the right of a son by a *dhanti* wife to half the father's estate and the proprietors had admitted that the latter son was entitled to half the khaikari holding, it was *held* that the latter were estopped from contesting the right of the latter son in a subsequent suit.

The court was not prepared without further enquiry to accept the general principle that in Garhwal the issue by a *dhanti* wife inherits equally with the issue of a lawful wife.

IN this case the lower court (Pandit Manik Lal Joshi had laid down the general rule that in Garhwal the sons of a *dhanti* wife inherit equally with sons by a lawful wife. The case is recorded as containing a brief discussion of this local custom and another instance of the admitted succession of the son of such a connection. The parties were Khasias (Khas-Rajputs) by caste. The facts appear sufficiently from the court's order. Jamnu, the legitimate brother, since deceased, had admitted Jhagru's right to a share during mutation proceedings, in which the proprietors, the plaintiffs, had also admitted his right to a share in the khaikari holding.

ORDER BY COLONEL G. E. ERSKINE, COMMISSIONER.

I am not prepared, without further very full and careful enquiry, to assent to the finding of the deputy collector that in

Garhwal the issue of a *dhanti* wife is entitled to a share equally with the issue of a lawful wife. A case has recently been before me in which the officer (Pandit Jai Datt Joshi) presiding in another revenue court in Garhwal, ruled precisely the reverse * and that ruling is in accordance with the ordinary Hindu Law. But in this case I find that the deceased Jamnu admitted that the present respondent Jhagru was his half-brother—the son of his father by a *dhanti* wife—and that he was entitled to half the property of their common father in the khaikari holding on paying Rs. 310 on account of their father's debts. The proprietors at the same time admitted that Jhagru was a co-sharer in the khaikari.

The proprietors are, by their admission, estopped from now challenging the right of respondent Jhagru. As to their objecttion that Jhagru had not paid the share of his father's debts, for which Jamnu stipulated, that is a matter which does not concern the appellants, but rests entirely between Jamnu's heirs and Jhagru.

I see no reason to interfere. Appeal is dismissed with costs.

Before Colonel G. E. Erskine, Commissioner.

JAMNU RAULYAL, MAUZA BUDOLI (APPELLANT-PLAINTIFF) *v.* MUSAMMAT MANULI, WIFE OF JAYA AND KESHOR, LAL SINGH, MOLU AND MAN SINGH, SONS OF JAYA (RESPONDENTS-DEFENDANTS).

[Revenue regular appeal no. 3 of 1893-94.]

Appeal against an order of Pandit Manik Lal Joshi, Deputy Collector, Garhwal, dated the 29th August, 1893.

March 13, 1894.

Hindu Law—Inheritance—Levirate—Rights of widow—Daughter's inheritance.

Where the widow of an elder brother lived with the younger brother, it was *held* that after the latter's decease without male issue she was not entitled to a widow's estate in his property but must look to her sons (by the elder brother) for maintenance. *Held*, further, that the daughter of the younger brother by his lawful wife) was not entitled to inherit his property, which was decreed to the collateral heirs, third brother and nephews.

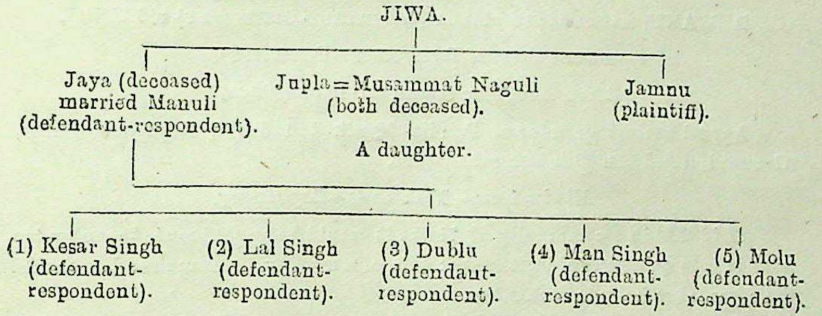
THE facts of the case appear sufficiently from the judgement. The ruling lays down the principle of succession, where the elder brother's widow lives with the younger brother under the levirate custom, and also supports the Kumaun custom excluding the daughter from inheritance in the presence of any male heirs.. Under the usual Hindu Law the daughter succeeds after the widow in preference to collateral heirs.

---

* *Banuar Singh* v. *Bhawan Singh and others* of Kalwari Patti Iriakot. Decision of the 23rd October, 1893.

ORDER BY COLONEL G. E. ERSKINE, COMMISSIONER.

It will be well to show the relationship between the parties :—


JIWA.
Jaya (deceased) married Manuli (defendant-respondent).
Jupla = Musammat Naguli (both deceased).
A daughter.
Jamnu (plaintiff).
(1) Kesar Singh (defendant-respondent).
(2) Lal Singh (defendant-respondent).
(3) Dublu (defendant-respondent).
(4) Man Singh (defendant-respondent).
(5) Molu (defendant-respondent).

Jamnu (already possessed of one-third of the ancestral property) sued the defendants-respondents for half of the one-third share of his brother Jupla. The five male defendants admitted the claim, but Musammat Manuli objected that after the death of her husband she cohabited with her brother-in-law Jupla up to his death, and therefore, under Hindu Law, she was entitled to enjoy Jupla's share for her lifetime.

The lower court found that Manuli had lived with Jupla after Jaya's death, and further recorded that two of her sons by Jaya admitted that she had had a daughter (still living) by Jupla. On these grounds the lower court held that Manuli (whom it designates the widow of Jupla) was entitled to hold Jupla's share for life.

I do not find that Manuli's sons, Keshri and Molu, did admit that Manuli had a daughter by Jupla, and before me Manuli distinctly states that the daughter is not her's but that of Musammat Naguli, the married wife of Jupla who died at the same time as Jupla during a cholera outbreak.

Moreover, apart from this Manuli cannot be regarded as the wife or widow of Jupla ; she is the widow of Jaya and should look to her sons for support. The daughter of Jupla by his wife Naguli is not entitled to Jupla's share, whatever may be her right to maintenance from those who have succeeded to her father's share.

I accept the appeal, set aside the lower court's order and decree in favour of Jamnu half of the one-third share of Jupla, the other half remaining with the heirs of Jaya.

Appellant will get his costs in both courts.

Before Colonel G. E. Erskine, Commissioner.

DEWANU, MAUZA MAKU MALLA (APPELLANT-DEFENDANT) *v.* LUNGI, MAUZA PHEGU (RESPONDENT-PLAINTIFF).

[Revenue regular appeal no. 19 of 1893-94.]

Appeal against an order of Pandit Manik Lal Joshi, Deputy Collector, Garhwal, dated the 19th December, 1893.

Hindu Law—Naik caste—Legitimacy.

March 15, 1894.

Held that in a community of Naiks it would be superfluous to enter too closely into questions of legitimacy: sons of a man by the same mother should be regarded as heirs to each other.

THE women of the Naik caste are practically invariably brought up to the profession of prostitution. In this case Lungi claimed to succeed to the estate of Rama, deceased, alleging that they were both sons of Harku by his wife Kali. Defendant alleged that Lungi was the son of Kali by another man and born after Harku's death, and that Harku was the son of his (defendant's) aunt, a prostitute, hence he claimed the estate.

ORDER BY COLONEL G. E. ERSKINE, COMMISSIONER.

I see no reason to doubt that Rama was in possession until his death in 1889. I also concur with the lower court that Lungi was the brother of Rama. In a community of Naiks it would be superfluous to enter too closely into questions of legitimacy. By the usual custom of that community both Rama and Lungi should be regarded as heirs of Harku by the same woman (Kali). They should be regarded as heirs to each other. Lungi has a far better title to succeed Rama (his own brother) than Diwanu who can only set up relationship some generations back in a left-handed fashion.

The decision of the lower court seems to me to be in accordance with the equity of the case, whether regard be had to possession or relationship. Appeal dismissed with costs.

Before Colonel E.E. Grigg, Commissioner.

BACHI OF MAUZA BASYUR (APPELLANT-DEFENDANT) *v.* MAHENAR SINGH (RESPONDENT-PLAINTIFF).

[Revenue regular appeal no. 61 of 1892-93,]

April 28, 1894.

Hindi Law --Inheritance—Illegitimate sons—Claim to succeed to collaterals.

Held that among families of the inferior Bisht caste, sons by a *dhanti* wife, though they may succeed to a share in their father's estate, do not inherit to collaterals.

THE parties in this case were Bisht Rajputs of the inferior cultivating type; it appears that the Bisht caste, a widespread one, includes various grades, some of whom are evidently of the Khasia class. Among the lower grades of Bishts it appears from this case that sons by *dhanti* wives inherit a share of their father's property equally with the sons by lawful wives, but do not inherit to collaterals, except in the absence of legitimate descendants.

The facts of the case appear from the enquiry into local custom made on remand by the lower court, which reported as follows :—

This case has been remanded by the appellate court for further enquiry as to whether the common father's property having been divided between the offspring of the legal and *dhanti* wife, and separate possession having been given, the plaintiff descended from the *dhanti* wife's son, can claim to inherit a share in the property of one of the sons of the legal wife.

As desired by the appellate court, the parties were given ample opportunity of proving the custom and I have also examined an independent witness of respectability and standing. There would seem to be some doubt as to the exact status of a woman known as a *dhanti* wife. The parties in the present case are Bishts, and I examined Trilok Singh, thokdar of Naugaon, who is also a Bisht, and a man of good standing. To my surprise, he repudiated the notion of being a Bisht like the parties to the present suit. He is something higher, and he says in his community a *dhanti* wife is one who takes up her abode with a man, and no marriage ceremony is performed with her; and that it does not matter if money is paid for her or not. But in the case of Bishts of zamindari class, like the parties to the suit, if money is paid for a *dhanti* woman, she is treated as something superior to one for whom no money is paid. Then, the witness adds, the custom is different for different villages and for different classes of Bishts. Thus, then, it is clear from this man's statement that no general recognized custom prevails on the subject, and it is very much what each village community may choose to determine upon for its own special guidance. I am afraid it must be admitted that the tone of morality here is not of a very high standard amongst the village classes, and the custom regulating inheritance is not clearly defined. To accept oral evidence of interested witnesses will not be of much help in arriving at the truth. Trilok Singh's evidence is disinterested and may be relied on as representing something approximating the actual state of affairs at the present time. So that, according to him, if there are two sons, one by a *dhanti* wife and the other by a legitimate wife, and if the latter's son dies without issue, then his share is inherited by the *dhanti's* son. This is opposed to Hindu Law, as will be seen from paragraph 467 of Mayne. It is there laid down that illegitimate sons can only take to their father's estate. They have no claim to inherit to collaterals. If, on the other hand, Trilok Singh adds, there is issue by a legitimate wife alive, or a grandchild, then he would succeed to the share of the deceased son of another legitimate wife, to the exclusion of the *dhanti* wife's son. Legitimate wives cannot partake of food with the *dhanti* wife, who is, thus, a social outcast.

Applying the custom—as far as it has been possible for me to ascertain what it is—to the present case, it would appear the plaintiff-respondent, Mahenar Singh, who is the grandson of Sagat Singh, has no claim to inherit any portion of his deceased uncle's (Joga's) share. Sagat Singh enjoyed the dubious privilege of having no less than three wives—two are called legitimate and one *dhanti*. The sons of the two former were Madho Singh and Joga, and that of the *dhanti* woman, Mohan Singh. During his lifetime Sagat Singh divided off his property, giving each of his three sons a one-third portion. Madho Singh and Joga were recorded together on two-thirds—Joga being shown as Madho Singh's *shikmi*; and Mohan Singh, by the *dhanti* woman, was recorded separately. Joga died without issue. Madho Singh is succeeded by his son Bachua, the present defendant, and Mohan Singh by his son Mahenar Singh, the present plaintiff. The plaintiff sues to succeed to half of Joga's share, and I gave him a decree in the first instance, as my limited experience in the hills has shewn me the marriage tie sits very lightly on the village classes, and it is by no means an easy matter to say who comes within the term "legitimate wife." I have not seen any great distinction laid down between children of legitimate women and those of *dhanti* ones. It must be borne in mind that courts of justice in Kumaun have no written law in such cases to guide them, and, as appears from the present enquiry, it is far from an easy matter to ascertain, with any degree of certainty, the actual custom prevailing in these parts in such an important point as inheritance. I have failed to trace any precedent and I should hail with delight an authoritative ruling on the subject by the appellate court. With these remarks I re-submit the proceedings to the appellate court for final orders.

FIRST ORDER BY COLONEL G. E. ERSKINE, COMMISSIONER, DATED THE 11TH DECEMBER, 1893.

It would seem that on Sagat Singh's death his property was thus divided :—

To Madho Singh and Jogiya, sons of his lawful wife ... ...Two-thirds.

To Mohan Singh, son of his *dhanti* wife ... One-third.

Plaintiff is the son of Mohan and he now sues for half of the share of Jogiya whom he calls his uncle.

The lower court has decreed the claim on the ground that in Kumaun the children of kept women are not debarred from inheriting equally with children of the lawful wife.

This however is hardly the question at issue. That question is whether, the common father's property having been divided between the offspring of the legal and the *dhanti* wife, and separate possession having been given, the plaintiff descended from the *dhanti* wife's son can claim to inherit a share in the property of one of the son's of the legal wife. The lower court quotes no authority for its finding in favour of plaintiff. The question whether the offspring of a Brahman by a *dhanti* wife could succeed to the estate of a collateral of their father was discussed in the case of *Harkishan* v. *Radha Patti*, which came before the court in appeal by the defendant and the final decision, dated the 24th July, 1890, was adverse to the defendant, it being held that the offspring of the *dhanti* wife could not succeed to the estate of collaterals of their father. But that again is not precisely analogous to the point now raised.

I remand this case for further enquiry as to the issue indicated in the paragraph next preceding this. The parties should be given an opportunity of proving the custom and precedents; if any can be found should be quoted by the lower court. The proceedings will then be re-submitted to this court and enable it to dispose of the appeal.

FINAL ORDER BY COLONEL E. E. GRIGG, COMMISSIONER, DATED THE 28TH APRIL, 1894.

The report of the lower court, dated the 14th March, 1894, is fairly to the point.

But apart from the question raised by the learned Judge I think it is clear that the division made by the grandfather of the parties must be held to be a bar to the claims set up by Mahener Singh, and therefore on that ground alone I would have dismissed the claim and decreed this appeal. The subsequent enquiry however clears up, to a considerable extent, the custom prevailing with regard to the law of inheritance among Bishts in the case of a dispute arising between the children by a lawful and *dhanti* wife, and I have no hesitation in decreeing the appeal with all costs.

Before Colonel E. E. Grigg, Commissioner.

CROSS APPEALS NOS. 4 AND 6—LAL SINGH AND GUSAIN, NAIKS OF MAUZA RAMGARH, THROUGH THEIR GUARDIAN MUSAMMAT MUNIA (APPELLANTS-PLAINTIFFS) v. MUSAMMAT SUNDAR, BAREILLY (RESPONDENT-DEFENDANT).

NUMBER 5—MUSAMMAT SUNDAR (APPELLANT-DEFENDANT) v. LAL SINGH AND GUSAIN REPRESENTED BY THEIR GUARDIAN MUSAMMAT MUNIA (RESPONDENTS-PLAINTIFFS).

[Civil appeals nos. 4, 5 and 6 of 1894.]

Appeal against an order of Mr. L. H. Turner, Assistant Commissioner, Naini Tal, dated the 13th March, 1894.

September 3, 1894.

Hindu Law—Naik caste—Custom of inheritance—Right of sisters to inherit.

Held that among the members of the Naik caste sisters inherit their brothers' estate, where the latter die without male issue, in preference to male collaterals.

THIS ruling is the main authority on the peculiar customs of inheritance prevailing in the caste of Naiks. The facts appear fully from the order of the lower court which is reproduced below.

It may be noted that in the latter part of the Commissioner's judgement the expression "male heirs" is apparently loosely and inaccurately used for "male descendants." In the present case the plaintiff-appellants were male collateral heirs, but their claim was rejected in favour of the sister.

The lower court's judgement runs as follows:—

These suits were joined as they appeared, and were allowed by both parties to depend on substantially the same issues. The first, no. 227 of 1893, is to recover jewels and other movable property valued at about Rs. 7,577-8-0 of which plaintiffs alleged that defendants forcibly dispossessed them. The second, no. 308 of 1893, is for a declaratory decree of proprietary right in certain immovable property valued at Rs. 12,300 which descended to plaintiffs by inheritance as heirs of Kusal Singh, deceased—the property having been his. They alleged that they are in possession of all this immovable property covered by the second suit, and therefore sue for a declaratory decree only.

Defendant claims the property covered by both suits as heir by proprietary right, she being the lawful heir of Kusal Singh.

The following issues were framed :—

(1) What is the property sued for?

(2) Whose is it?

(3) How much of this property did defendant obtain possession of?

(4) Can plaintiff's guardian, Munia, sue without a certificate of guardianship?

(5) Is plaintiff's guardian, Munia, entitled to the possession of the property?

(6) Is the stamp on the plaint in suit no. 308 sufficient?

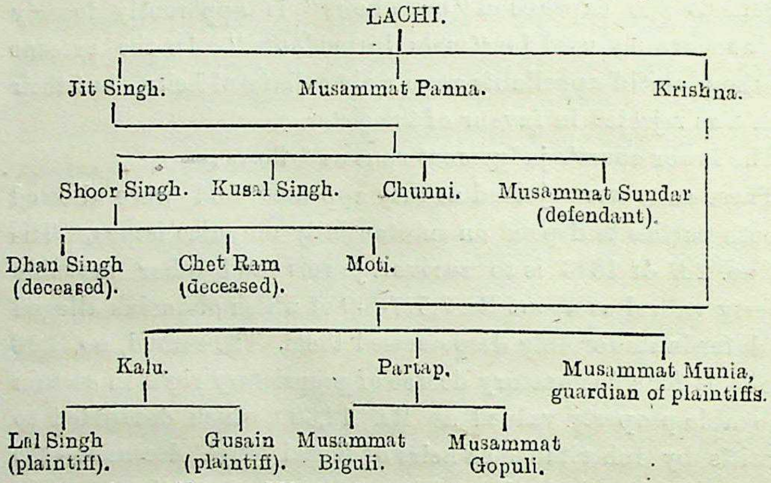
(7) Is the suit barred by rule 7, Kumaun rules?

The onus of proving all being on plaintiffs.

Of these issues nos. 6 and 7 entitling the plaintiffs to sue were decided in their favour on the 3rd November—vide court's order contained in the body of the file. Of the others the most important is no. 5, which should however be amended as follows :—

"Are the plaintiffs Lal Singh and Gusain entitled to inherit the property claimed from Kusal Singh, deceased, to the exclusion of defendant ?" and this will be first considered.

The following family tree is admitted by both parties :—


LACHI.
Jit Singh.
Musammat Panna.
Krishna.
Shoor Singh.
Kusal Singh.
Chunni.
Musammat Sundar (defendant).
Dhan Singh (deceased).
Chet Ram (deceased).
Moti.
Kalu.
Partap.
Musammat Munia, guardian of plaintiffs.
Lal Singh (plaintiff).
Gusain (plaintiff).
Musammat Biguli.
Musammat Gopuli.

By the ordinary Hindu Law as laid down in the Mitakshara, there is no doubt that a sister is excluded by any male heir, even though much more remote than plaintiff's are. Defendant however being the sister of deceased, bases her title on the custom of her caste—that of Naiks. The female members of this caste are generally, perhaps universally, brought up to the trade of prostitution, which they practise with very lucrative results in the plains. The customs claimed by defendant are that, on the death of a male without issue, his sisters and brothers inherit, and that the male and female members of a family have equal rights, and therefore share equally.

In support of this there are adduced the following unreversed decisions of Kumaun courts :—

Suit no. 90 of 1891 in the court of H. Shaw, Esq., Deputy Collector, Almora, *Chunni and Aouli* v. *Narwa, Madhia, Himatua and Mohan Lal* (exhibit I). In this it was held that the sisters had an equal share with the brothers, defendants nos. 1, 2 and 3. These defendants did not however resist the claim, it being against their interest to do so, as the property in which plaintiffs claimed a share had been attached by defendant no. 4 in execution of a decree. The case however filed as exhibit Q, is not open to this objection, *Chunni* v. *Sri Ram*, which was a claim by a sister on her brother for half share in property. This was decided on the 24th September, 1890, the sadar amin of Garhwal, an officer of great knowledge and experience in the hills, finding for plaintiff on the ground that the sister had equal rights with the brother. This decision was upheld on appeal by W. R. Partridge, Esq., Deputy Commissioner of Garhwal, dated the 25th November, 1890.

All the witnesses called by defendant and examined on commission in Bareilly agree that this is a recognized custom of the caste. They are, most of them, respectable men with opportunities for knowing the custom of this class, as either they or their relations have kept women of the caste as mistresses. They adduce numerous instances of women succeeding by inheritance.

All the witnesses from Ramgarh in Naikana, however, the native village of the parties, speak against the existence of any such custom.

The strongest evidence however is afforded by the *phant* and *dakhilkharij* files of Naikana village. These show that property has again and again passed to women, and that, roughly speaking, half the shares in the village are held by women, many of the transfers being from brother to sister. By ordinary Hindu Law a widow is almost the only woman who could hold a share, as almost invariably there is some male heir, though remote, who excludes the women.

A large number of these *dakhilkharij* cases, including many of the transfers from a brother's name to a sister's, were decided at one time on the spot by Mr. Garstin, Senior Assistant Commissioner, on January 22, 1883.

The order for mutation mentions the facts that the sharers of the village were present and agreed to these mutations.

The witnesses from Ramgarh give as a reason, against defendant inheriting, the rule that sisters cannot inherit their brother's property except in default of male heirs, and except if they reside in the family: but that by entering another man's house as a kept mistress, they lose all rights in their family.

That a woman should become a kept mistress is no reason why she should lose her family rights. The relationship is not that of marriage and carries with it no rights of inheritance to the property of the patron. There is moreover much evidence to prove that this relationship is purely voluntary and terminable, that during its existence the women are not cut off from family intercourse with their caste, and that on its cessation, as in the case of defendant, Sundar, by the death of her patron Mulchand, they actually go back and live with other members of the caste. The weight of evidence supported by numerous instances, and in particular the entries in the *phant* prove that far from sisters being excluded by male heirs, they are on the same footing as brothers. The probable reason for this difference from ordinary Hindu Law is that the women of this caste, instead of being merely passive, non-productive members of the family, are actually the chief earners of it, their gains being far more than those of the men. Moreover, the history of this litigation indicates that the claim is not really on behalf of Lal Singh and Gusain, the nominal plaintiffs, at all. It originated in a criminal petition by Munia (guardian of plaintiffs in this suit) against Lalu, filed July 22, 1893, charging defendant under section 380, Indian Penal Code, with stealing the jewellery and other immovable property—the subject of suit no. 277 now under trial. In her petition, and in her conduct of the criminal case, which was dismissed on August 21, she nowhere claims on behalf of Lal Singh and Gusain, but throughout makes mention of the property as her own. Musammat Sundar, the defendant, admittedly took no share of the property sued for on two previous occasions. First when Chunni her sister died; second when Chet Ram and his brother died. But she gives a sufficient reason for this. She was the member of the family who of all was making the largest earnings. The family was joint. There was therefore no need for her to have a share; it was rather the other members of the family who were getting a share out of her earnings.

The court therefore finds on this issue that the custom is established that the women and men of the caste, Patars and

Naiks, are on equal footing, and in particular that Musammat Sundar, the defendant, has not lost her rights of inheritance, and that she is a nearer heir and therefore inherits to the exclusion of the plaintiffs Lal Singh and Gusain.

It is unnecessary to consider other issues, as the finding on this issue involes the dismissal of the suits with costs.

Decree for defendant with costs, those on the first suit being Rs. 442-4-5 (including Rs. 301-8-9 pleader's fee and Rs. 40 cost of stamp on security bond) and those on the second suit being Rs. 7-12-0 (including Rs. 6-12-0 pleader's fee). Total costs Rs. 450-0-5, for which the decree is against Munia only, not against the minors Lal Singh and Gusain.

ORDER BY COLONEL E. E. GRIGG, COMMISSIONER.

For the appellant Babu Din Dayal has in a very able manner argued against the admission of custom, unless that custom has been invariably adhered to and is very ancient, quoting from Field's *Law of Evidence* in support of his arguments. He also points out that the evidence of Balesi Lal, Musammats Durga, Keshari and Maldi is that of interested parties, and as regards the witness who was to state to the *Shastras* that he was ignorant of their contents.

He considers the lower court was wrong to afford the respondent three months wherein to prepare evidence in support of his contentions, that it was not right to have had evidence of the witnesses taken by commission and as to the mutations which had been effected in the names of females that it was not clear whether the cases were on all fours with the present. He objects to the application of the Garhwal courts finding in respect to a similar claim on the ground that the custom of the Naik castes in the two districts differ. On the other hand, the learned counsel for the defence urges most strongly that the entire evidence supports the respondent's contention that she is entitled to inherit.

The lower court has made a very careful and patient enquiry regarding the subject in dispute, and I think he has shown very clearly that in the past the right of sisters to succeed to the ancestral property has been the custom in the village. The caste of the parties is that of Naiks and Patar or prostitutes. The females, so soon as they arrive at the age of puberty, are sent forth in the world to earn their living. The respondent had to go forth and was taken into the keeping of one Mulchand with whom she resided as his concubine for upwards of 20 years and until his death. Her wages were two hundred rupees a month and the court is undoubtedly sound when it urges that such an income gave the recipient a status superior if anything to those of her kinsmen who lived on the proceeds of the landed property alone.

Moreover, their appears not the slightest reason for doubting that in the past mutations have been regularly effected in the names of sisters. In the plains Patriyas do, so far as my recollection goes, succeed to their brother's property in default of male heirs, and it would appear a similar custom prevails in the hills. I decline to interfere and dismiss the appellant's appeal with costs and as regards respondent's objection as to adjudication of costs there is no appeal.

Before Sir Arthur Strachey, Chief Justice and Mr. Justice Knox.

NARPATI OF MAUZA CHICHON, PATTI TALLA CHAUKOT, ALMORA DISTRICT (DEFENDANT-APPELLANT) *v.* KHIMIA AND OTHERS OF DITTO (PLAINTIFFS-OPPOSITE PARTY).

[Revisional civil miscellaneous no. 228 of 1898.]

January 4, 1899.

Hindu Law—Sautia Bant—*Proof of custom—Second Appeal.*

In this case a *Sautia Bant* (inheritance *per stirpes*) was held to be sufficiently proved as a family custom by the lower courts. The Commissioner in second appeal disagreed with the lower courts' findings on the evidence and reversed their orders, holding that the fact that the appeal had reference to custom justified a second appeal. On a reference by the Local Government to the High Court it was ruled that the question whether one custom or another prevailed in a certain family was a question of fact only and no second appeal lay on the point. The Commissioner's order was reversed and that of the first appellate court restored.

IN this case the three plaintiffs, sons by one wife, claimed by *Bhai Bant (per capita)* three-fourths of their father's landed estate, while the defenant, the only son by another wife, claimed a half share by *Sautia Bant* (inheritance *per stirpes*). The lower court held that the defendant was proved to have inherited under a family custom half the estate and to have been in possession of that area for a considerable period.

The order of the first appellate court (Mr. Gracey, Deputy Commissioner,) which was restored by the Local Government was as follows :—

Four witnesses were produced by appellants. Two of these declare the respondent to be in possession of one-quarter. Of the other two one distinctly stated that by *Sautia Bant* the respondent is and has been in possession of a half, while the other stated that he has been in possession of a half, but only for the last year. I agree with the lower court that there can be no reasonable doubt that the respondent has been in possession of half the property since his father's death, which the settlement record shows to have occurred as far back as settlement.

Even were the plaintiff-appellant otherwise entitled to oust the defendant, he is barred from suing by the law of limitation. But the fact of possession proves that the respondent received his heritage according to *Sautia Bant*.

From all points in view the lower court was right in dismissing the suit. The appeal is dismised with costs.

Reference to the High Court by the Local Government, G. O. no. 865/VII—11B-1053, dated the 10th November, 1898.

With reference to the provisions of rule 17 of the Kumaun rules, I am directed to forward the complete records in the case of *Khimia and others* v. *Narapati*, together with a petition from the latter appealing against the decision of the Commissioner of Kumaun reversing the order of the lower courts in the matter of a claim to certain *khaikari* rights in the Almora district.

2. The Government is advised that no second appeal lay to the Commissioner under section 584, Civil Procedure Code, and that the appeal should not therefore have been admitted. The main point at issue in all courts was whether the custom of *Sautia Bant* (division of the land according to the number of wives) or that of *Bhai Bant* (division among brothers) prevailed in a certain family. On the determination of this question depended the division of the property among the parties to the dispute. The lower courts decided on what would appear to be satisfactory evidence that the custom of *Sautia Bant* prevailed.

The plaintiffs appealed to the Commissioner who admitted the appeal on the ground that it had reference to custom and was therefore admissible. The Commissioner arrived at a contrary conclusion to that of the lower courts and reversed their findings.

3. It would appear that there was no question whether the decision of the lower courts was contrary to custom or usages, nor was there any question as to the interpretation of custom, but merely whether one custom or another prevailed in a certain family. The fact that the case as stated by the Commissioner had reference to custom is not of itself sufficient to justify the admission of an appeal under section 584, Civil Procedure Code.

I am to request that the Government may be favoured with the opinion of the High Court of Judicature on the matter.

ORDER BY THE HIGH COURT.

Strachey, C. J., and Knox, J.—We agree with the remarks made by the Secretary to Government and return this as our answer to the reference.

Before Mr. J.S. Campbell, C.S.I., C I E., C.S., Commissioner.

SUKHDEO PRASHAD, SON OF SITAL PRASHAD, KHATRI OF KASHIPUR (APPELLANT-DEFENDANT) *v.* GAURI DATT, SON OF JWALA PRASHAD PANDE OF KASHIPUR (RESPONDENT-PLAINTIFF).

[Special civil appeal no. 16 of 1910.]

Appeal against an order of Mr. W. S. Cassels, I.C.S., Deputy Commissioner, Naini Tal, dated the 29th August, 1910.

January 26, 1911.

Hindu Law—Joint property—Sale of portion by one co-sharar without the consent of the other.

Where one of two joint Hindu brothers sold his share of the ancestral joint property without the consent of the other, the sale was declared void on the suit of the latter.

THIS decision applying the ordinary rule of Hindu Law on the point is reported, since it conflicts with the local custom prevailing throughout the hills. The lower appellate court decided the case by a reference to Mayne and the ordinary Hindu Law, and the question of local custom does not appear to have been raised at all. The custom of the hills as accepted by the Indian members of the 1915 committee and by a public meeting at Almora recently, was embodied in the following draft clause of the Bill prepared in 1915 :—

"A male adult coparcener in joint family property, other than a son or grandson during the lifetime of his father or grandfather, shall be deemed to be entitled at any time to alienate his ascertainable share of the joint estate without the consent of his coparceners, subject to any liability of his share for any common debt owed by the coparceners."

In the present case Gauri Datt, plaintiff, was the elder brother of Gobardhan, the vendor. Gobardhan sold his half of the ancestral property without the consent of Gauri Datt to one Sukhdeo Parsad. It was found that the two brothers were a joint family and no partition had been made.

Babu Din Dayal, vakil, for appellant.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I see no reason to interfere. The lower courts have found—and I think rightly—that there is no evidence on the record to justify the presumption that respondent and his younger brother had separated and were no longer members of a joint family, and that therefore the latter had no power to sell part of the joint property without respondent's authority ; and the sale-deed has been declared void.

Appellant failed to produce all his witnesses and, refused to pay the costs of an adjournment, so has no grievance on that point. He can certainly not claim a refund of the sale consideration from respondent.

I uphold the Deputy Commissioner's order and reject this appeal.

Before Mr. J. S. Campbell, C.S.I., C.I.E., C.S., Commissioner.

BUDH SINGH OF MAUZA DUMAILA, PATTI KHATLI, GARHWAL DISTRICT (APPELLANT) *v.* MUSAMMAT RANGI OF THE SAME VILLAGE (RESPONDENT).

[Special civil appeal no. 68 of 1912.]

Appeal against an order of Mr. C. M. Collett, I.C.S., Deputy Commissioner, Garhwal, dated the 12th October, 1912.

Claim—Declaration of right in $25\frac{7}{16}$ nalis of hissadari and $159\frac{12}{16}$ nalis of khaikhari land.

Hindu Law—Inheritance—Daughter's rights among Rajputs.

Held that among persons of the Gorla Rawat caste, being pure Rajputs, daughters inherit in preference to collaterals. *February 7, 1913.*

THIS is a simple case of the question of whether the local custom excluding daughters from inheritance was established or not in the case of Rajputs of the Gorla Rawat caste.

The plaintiff endeavoured to prove the custom, but was held not to have succeeded, and the Commissioner applied the rules of the Mitakshara Law and held that the daughter's claim was superior to that of near collaterals.

Babu Din Dayal and *Pandit Brij Mohan*, vakils, for appellant; and *Netra Mani*, mukhtar for the respondent.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I see no reason to interfere with the Deputy Commissioner's order.

The parties to this dispute are Gorla Rawats and pure Rajputs; and succession in their case is guided by the ordinary Mitakshara Law, unless there is strong evidence of peculiar local custom. This has not been established. I therefore uphold the Deputy Commissioner's finding that the daughter's claim to her father's land is superior to that of the collaterals—appellants—and dismiss this appeal with costs.

Before Mr. J. S. Campbell, C.S.I., C.I.E., C.S., Commissioner.

KARAM SINGH, MINOR, OF MAUZA TALLAGAON, PATTI UNCHAKOT, NAINI TAL DISTRICT (APPELLANT) *v.* (1) SHER SINGH MAHRA OF MAUZA DARIMA, (2) PREM SINGH BORA OF THE SAME VILLAGE (RESPONDENTS).

[Special civil appeal no. 15 of 1913.]

Appeal against an order of Mr. W. S. Cassels, I.C.S., Deputy Commissioner, Naini Tal, dated the 18th November, 1912.

June 25, 1913.

Hindu Law—Illegitimate son—Inheritance by such sons among Khasia castes—Claim by such son to control alienation by father during the latter's lifetime.

Held that though the illegitimate sons of men of Khasia castes in the hills inherit a share of their father's estates on the death of their fathers, yet their rights in the estate only accrue on the death of the father; they cannot claim to control their father in his disposition of the property during his lifetime.

IN this case a distinction is drawn between the right of the illegitimate son (by a *dhanti* wife) of a man of the Khasia class to inherit a share of his father's estate, which right is admitted and is illustrated in the history of the case, and the claim by such a son to control his father's alienation of his landed property, which claim is ruled to be inadmissible. Prem Singh, defendant, had himself inherited landed property from his father, Bhawan Singh, though he (Prem Singh) was an illegitimate son by a *dhanti*.

In this suit Prem Singh's illegitimate son, Karam Singh, by a *dhanti* mother claimed to contest an alienation of certain landed property made by his father. It was held that such rights as may belong to illegitimate sons in Khasia castes are confined to inheritance on their fathers' death; they do not acquire a joint interest in the family estate on birth. The parties were hill Khasias or Khas-Rajputs of the Bora caste.

The facts of the case and a full discussion of the position appear in the judgement of the first appellate court (Mr. W. S. Cassels, Deputy Commissioner of Naini Tal) which is as follows:—

I have heard the learned counsel and have perused the record.

The facts of the case are simple.

Prem Singh, the illegitimate son of his father, sold in 1904 landed property which he had inherited from his father to Sher Singh. Karam Singh, the minor and illegitimate son of Prem Singh, sues for the cancellation of the sale on the ground that it was a sale of ancestral property, and that the sale was not on account of any prior debt nor was it one binding upon the joint family.

The parties to the suit are hillmen and villagers and the first thing to see is what their local status is. Mr. Stowell in his book on land tenures of the Kumaun division, page 52, observes: "Every Hindu villager in Kumaun calls himself a Rajput or a Brahman. But in reality . . . the most numerous class of proprietors in the hills are really of Sudra origin or of castes of dubious standing. Some of them have assumed the sacred thread and others are gradually doing so, but they are, as a matter of fact, Sudras and of mixed origin." In the present case the parties call themselves Singh, but this is no evidence that they are of Rajput origin.

Padam Singh, witness for the plaintiff-respondent, says: "Prem Singh is my cousin. We plough our own lands. We are Khasia zamindars. We work as coolies and dandy bearers . . . I am not a Sudra or Rajput."

This statement is clear, but the whole evidence tends to show that the parties are ordinary hill hissadars, and therefore Khasias and not pure Rajputs.

The next point is the nature of the debt on account of which the sale took place. It is proved that the money was applied to pay for bullocks, goats and jewellery purchased by Prem Singh. There can be no question that, if a Hindu died leaving a debt behind him incurred for the above purpose, his heirs would be bound to pay the debt, as the debt was in no way immoral.

The third point to notice is that this suit is brought by a minor, aged 13 or 14, under the guardianship of his mother—the unmarried or *dhanti* wife of Prem Singh—against his father Prem Singh. It looks very much as if Prem Singh had really instituted this suit himself, in order to get the sale-deed set aside.

The point now reached is this. The parties are Khasias and the debt for which the sale took place was not of an immoral nature.

Mr. Stowell in his book, page 52, observes: "It may safely be asserted however from a considerable experience of incidental and undisputed instances that among the ordinary villagers of somewhat dubious caste as distinct from the undoubted Brahman and Rajput castes, an illegitimate son inherits equally with legitimate sons as a matter of course."

The question at issue here is not however whether an illegitimate son inherits from his father. Admittedly in the present case Prem Singh, an illegitimate son, did inherit property from his father. The question is whether an illegitimate son has any right to control his father in the alienation of the family property.

On the subject of the right of sons to control their father in the alienation of the family property, Mayne (Hindu Law, section 322, page 382), observes:—

"It must be owned that the principle of the Mitakshara that sons have a right to control their father in the alienation of the family property is almost nullified by the other principle that they are bound after his death to pay his debts even though contracted without necessity; and by the logical extension of that principle, recently laid down by the Privy Council, that the father is entitled to sell the family property in order to pay off his own debts, which were not contracted for the benefit of the family, but which the sons would be under a moral obligation to discharge."

(*Girdharee Lal* v. *Kantoo Lal* 1 I.A. 321: S.C. 14, B.L.R. 187, S.C. 22 Suth. 56.)

It has been seen that Prem Singh's debts, in the present case, were not of an immoral nature, but were such as his heirs would be bound to discharge. On the principle laid down above by the Privy Council, Prem Singh was entitled to sell the family property in order to pay his debts. If the above principle governs the cases of *all* legitimate sons, much more does it govern the case of an illegitimate son. For the question arises, does an illegitimate son have a joint interest with the father in the property? Are they members of a joint family?

As to this, Mayne (page 374, section 316) says: "Disposition of property by a father can of course be objected to by those who have a joint interest with him in the property, either by joint acquisition or by birth. Where the objection is based on the latter ground, it is necessary to show that such an interest vested in the objector at his birth or by his birth."

On the subject of illegitimate sons, Mayne (page 629, section 503) says: "Illegitimate sons in the three higher classes never take as heirs, but are only entitled to maintenance . . . The illegitimate son of a Sudra may however under certain circumstances inherit either jointly or solely."

And again (section 506, page 633) Mayne says: "Supposing an illegitimate Sudra to be entitled, the next question would be as to his rights. Upon this the Mitakshara says in explanation of the texts of Manu and Yajnavalkya: 'The son begotten by a Sudra on a female slave, obtains a share by the father's choice, or at his pleasure. But after the demise of the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share, etc.'"

The point brought out here is that the illegitimate son of a Sudra inherits "by the father's choice or at his pleasure." The inference to be drawn is that he has no rights at birth or by his birth. His inheritance depends upon his father's choice or pleasure.

It may be said that this is all very far from Kumaun, where Mr. Stowell says that in the case of ordinary Khasia families an illegitimate son inherits equally with legitimate sons as a matter of course. But the point is that in this case the suit is based on the principle of Hindu Law that a son has a right to control his father in the alienation of the family property.

If therefore the plaintiff in this case bases his claim upon the ordinary Hindu Law, it is necessary to go to the Hindu Law to see that he cannot claim to have such a right, as he is illegitimate and did not inherit such a right, at his birth or by his birth.

Another point is whether property inherited by Prem Singh, an illegitimate son, from his father, can be properly styled ancestral property. I do not think it can be so called.

Lastly, Prem Singh himself says: "I got the share on the death of my father . . . While the father is alive, he stays in possession, but on his death the property is divided." This statement seems to show that while an illegitimate son among hill Khasias may inherit from his father, he does not have a share in the property till his father's death. He cannot therefore claim to control his father as regards the alienation of the property belonging to the father. For all these reasons I hold that the sale cannot be cancelled, and I allow the appeal. The sale will stand and the claim is dismissed with costs.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I see no reason to differ from the learned Deputy Commissioner's finding in this case. There is no doubt that among the Khasias of Kumaun an illegitimate son by a *dhanti* wife is entitled to inherit a portion of his father's ancestral estate. But this right of inheritance accrues after the father's death, and the Deputy Commissioner has given substantial reasons for holding that such an illegitimate son has no right of control over the ancestral property during the father's lifetime.

In the present case the father parted with the property for purposes which were not immoral ; and even a legitimate son would have found difficulty in disputing the necessity for the sale.

For the above reasons I uphold the Deputy Commissioner's order and dismiss this appeal with costs.

Before Sir Henry Richards, Chief Justice, and Mr. Justice Tudball.

DULAB SINGH AND ANOTHER OF MAUZA PANCHALI LOHABA, GARHWAL (PETITIONER) *v.* MUSAMMAT GANGA AND ANOTHER (OPPOSITE PARTIES).

[Miscellaneous case no. 45 of 1914.]

June 18, 1914.

Hindu Law—Daughter's inheritance—Gift by widow to daughter and son-in-law—Suit by reversioners—Form of decree.

Where a Hindu widow gifted certain of her late husband's lands to her daughter and son-in-law jointly, and the collateral reversioners sued to set aside the gift, it was held by the Commissioner that the parties being pure Rajputs were subject to the ordinary Mitakshara Law and the daughter would succeed in preference to collaterals, and the suit was dismissed. On reference to the High Court by the Local Government, it was *held* that in view of the fact that the gift was partly to the daughter and partly to the daughter's husband, the suit was maintainable and a decree should be granted declaring that the gift would not bind the plaintiffs beyond the donor's lifetime, but that the daughter, if still alive, would have her rights of inheritance as a daughter on her mother's death.

THE facts of the case are interesting as illustrating local customs. Musammat Rupa, the donor, was originally the widow of one Shib Singh. On his death without issue she was taken to wife by his younger brother, Umrao Singh, by the local levirate custom and bore him five daughters including Musammat Ganga; Umrao Singh also left a lawfully married widow, Musammat Gaura.

Musammat Rupa gifted part of Umrao Singh's landed property to her daughter Musammat Ganga and son-in-law Darmian Singh, reciting that the latter had been adopted as a *ghar-jawain* (resident son-in-law) by Umrao Singh according to local custom. The court of first instance found that Darmian Singh had not in fact been so adopted.

The plaintiffs, nephews of Umrao Singh, sued to set aside the gift under the local custom, whereby daughters are excluded from inheritance by collateral heirs.

The Commissioner held that the parties being pure Rajputs must follow the normal Mitakshara rule, whereby daughters inherit in preference to collaterals, in the absence of proof of peculiar local custom, and the other daughters and widows were also nearer heirs than the plaintiffs, who thus had no status to sue.

The High Court on a reference returned the opinion quoted above, which was embodied in a decree by the Local Government (G. O. no. 930/VII—532, dated July 9, 1914).

It will be noticed that the legitimacy and right of inheritance of the daughters of Umrao Singh by his brother's widow were accepted by the courts.

There appears to be some inconsistency here; this peculiar custom of the levirate and legitimacy of the children by such a connection was accepted, although the parties were pure Rajputs in whose case it might be doubted, while the exclusion of daughters from inheritance, which is a more universal local custom irrespective of caste, was rejected on the ground that the parties were Rajputs (and not Khasias).

Pandit Mathura Datt Pande, vakil, for appellant.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER, DATED THE 29TH SEPTEMBER, 1913.

I see no reason to interfere with the Deputy Commissioner's order. These people are pure Rajputs and as such subject to the ordinary Mitakshara Law unless there is clear proof of any peculiar local custom in opposition to the normal law. There is no proof of such local custom in this case. Consequently the daughters would succeed to the parental property in preference to appellants. There are another widow and four more daughters, all of whom must be considered reversioners in preference to appellants, who thus have no status to apply for cancellation of the deed executed by Musammat Rupa in favour of Musammat Ganga. I uphold the Deputy Commissioner's order and dismiss this appeal with costs.

Opinion by the Allahabad High Court (Sir Henry Richards, C. J., and Tudball, J., dated June 18, 1914).

In our opinion under the circumstances set forth in the order of reference, the plaintiffs were entitled to maintain the suit, having regard to the fact that Musammat Rupa had made a gift partly in favour of her daughter's husband and partly in favour of the daughter. We think that the decree which the plaintiffs were entitled to was a decree declaring that the gift to Darmian Singh could not bind the plaintiffs beyond the lifetime of Musammat Rupa. Likewise the gift as a gift in favour of Musammat Ganga would not bind them beyond the lifetime of Musammat Rupa. Musammat Ganga would however have her rights as a daughter after the death of her mother if she was still alive. We think under all the circumstances of the case the parties ought to abide their own costs in all courts. This is our answer to the reference. The record may be returned.

Before Mr. P. Wyndham, C.I.E., C.S., Commissioner.

FATEH SINGH OF MAUZA KOTHGI, PATTI DASJULA, GARHWAL DISTRICT (APPELLANT) *v.* GABAR SINGH OF THE SAME VILLAGE (RESPONDENT).

[Special civil appeal no. 49 of 1915.]

Appeal against an order of Mr. J. M. Clay, I.C.S., Deputy Commissioner, Garhwal, dated the 18th September, 1915.

Held Law—Local customs regarding marriage among Rajputs—Inheritance—Proper framing of issues—Evidence necessary to prove local custom.

April 15, 1916.

Held that among the Bhandari caste of Rajputs a local form of marriage wherein the *Ganeshpuja* ceremony is performed, but the *Saptapadi* and *Phera Bhaura* are not performed is not a lawful marriage, and the son of a woman so married does not inherit; in such cases a clear issue must be framed on the specific point in issue and the party alleging a local custom in variation of the normal Hindu Law regarding marriage must prove clearly that the specific custom set up is followed in the caste to which the parties belong.

The parties in this case were Bhandari Rajputs of Garhwal. Fateh Singh, the son of Daulat Singh, sued to set aside a sale-deed and a deed-of-gift both executed by his step-mother, Musammat Purba, in favour of one Gabar Singh.

It was contended by the defendant that Fateh Singh's mother, Musammat Maina, the second wife of Daulat Singh, was not lawfully married to the latter, and therefore Fateh Singh had no title to inherit or to contest the alienations. Fateh Singh was successful in all the Kumaun courts, but the case was then referred by the Local Government to the High Court for opinion; the reply of the High Court is reproduced below, and in accordance with its opinion the Local Government remanded the case for further enquiry and decision by the Kumaun courts. The Commissioner's final order in second appeal from the remand decision is given below.

The above sketch and the orders reproduced give the facts of the case sufficiently.

If I may be permitted to expand the Commissioner's remarks in his final order, I would point out that to any one acquainted with the general trend of Kumaun custom it is apparent that the Hon'ble High Court (not to mention the Local Government in their reference) have fallen into the very error which they reprehend and on the basis of which the case was remanded.

The specific issue on which the case really turned was not whether Musammat Maina was lawfully married to Daulat Singh but whether by the local custom of the Bhandari caste sons by such a marriage (whether lawful or not) inherit as of right *(a)* equally with sons by a lawfully married wife or *(b)* as in this case in the absence of such other sons.

The local custom is not a question of the legality of the mother's marriage—there is often no question whatever that there was no legal marriage—but whether the particular caste does or does not follow the general custom of Khas-Rajputs (and other Khasias), whereby the sons of women not lawfully married but permanently living with the father as secondary wives, do inherit equally with legitimate offspring. As the Commissioner puts it "it is no doubt locally held that the son of Daulat Singh is quite legitimate enough to succeed to his father's farm."

Without going so far as to lay down that this *is* the custom of the Bhandari caste, I merely point out that the case was decided under the remand instructions on the wrong issue.

Opinion of the High Court (dated the 8th February, 1914) *on reference by the Local Government ; Chamier and Piggott, JJ.*

[Miscellaneous case no. 449 of 1914.]

This is a reference by the Local Government under rule 17 of the rules and orders relating to the Kumaun division.

The question in issue out of which this reference arises is whether Fateh Singh was the legitimate son of one Daulat Singh. It is proved that Daulat Singh was in the first instance lawfully married to one Musammat Purwa or Purba. While this woman was still alive Daulat Singh brought to his house one Musammat Maina, who is described as belonging to a lower sub-division of the caste of which Daulat Singh was a member. The facts found to be proved are that a bride price of Rs. 200 was paid to Maina's father; that she was brought to Daulat Singh's house in a dooly; that the *biradari* was feasted, and that a ceremony known as *Ganeshpuja* was performed. It is expressly found that the *Saptapadi* and *Phera Bhaura* ceremonies, which are ordinarily considered as necessary for the validity of a marriage among the higher castes, were not performed. The Kumaun courts have however come to the conclusion that the marriage was valid and Fateh Singh, the offspring of this marriage, was a legitimate son. The Local Government has referred this case to this court, because it is dissatisfied with the way in which this point has been dealt with by the local courts. We think there is reason for this dissatisfaction. We find that the issue as framed by the first court on this point was in the vaguest and broadest terms possible, namely, "Is the plaintiff entitled to sue?" The court of first appeal, which has come nearest to discussing the matter from a right point of view, after setting forth the facts above noted, proceeds to remark that it was the case for the plaintiff-respondent, that is to say, for Fateh Singh, that the *Ganeshpuja* is a form considered by the custom of Rajputs in the district of Garhwal as constituting a valid marriage, particularly in the case of a second marriage. It was there remarked that there was no evidence to this effect on the file, but a finding in favour of the validity of the marriage was arrived at on the ground that it is a matter of common knowledge that the ordinary Hindu Law and usage is considerably modified by local custom, especially in reference to marriage and succession among the Rajputs in the hills. This does not seem to be sufficient, because it does not find what particular modifications of the ordinary Hindu Law are recognized as sufficient to constitute a valid marriage, and whether the performance of *Ganeshpuja*, as alleged by the plaintiff in the present case, is such a modification. The court of second appeal has virtually adopted the decision of the Deputy Commissioner without discussing it. In the order of reference by the Local Government it is suggested that in order to prove a valid marriage it was incumbent on the plaintiff in this case, the burden of proof lying on him to establish his own legitimacy, to show that by the custom of the caste or district the ceremonies found to have been performed in the present case are considered as constituting a valid marriage, and that these ceremonies were performed with the object of constituting such valid marriage between Daulat Singh and Musammnt Maina. We desire to remark that in spite of the unsatisfactory state of the evidence on this point, we might have been prepared to accept as sufficient to cover any other deficiency in the plaintiff's case clear and overwhelming evidence that, from the date of her arrival in Daulat Singh's house, Musammat Maina was treated in every respect, by those persons who are likely to be well informed, as Daulat Singh's lawful wife. So far however from the evidence being clear and unambiguous, there is definite evidence to the contrary. The courts below have found that rice cooked by Musammat Maina was not eaten by the members of Daulat Singh's family or brotherhood. Under the circumstances we are of opinion that the point raised by the Local Government's order of reference should have been made the subject of a specified issue and determined as stated in the order of reference. We return the record with this answer, and we think all costs, including costs in this court, should abide the event of the suit.

FINAL ORDER BY MR. P. WYNDHAM, COMMISSIONER.

P. Brijmohan Chandola, vakil, for GABAR SINGH, *and* FATEH SINGH, *in person.*

This is a second appeal and the only point for this court to decide is "whether by virtue of any custom existing among the Bhandari sect Musammat Maina was legally married to Daulat Singh." The issue as so framed is on the son, Fateh Singh, and to be successful in the proof of a custom the learned lower appellate court shows many essentials are necessary. It is clear that the plaintiff Fateh Singh has come nowhere near the middle rung of his ladder in attempting to scale the formidable obstacle which the law casts up against him.

The persons are residents of northern Garhwal and probably have never heard of the Mitakshara Law. However, calling themselves Hindus they have to abide by it when they come to court. While in the simplicity of their life they have never assimilated the mass of detail laid down in this formidable volume,—yet the law strictly requires them to bring down from these hills a mass of evidence to prove they have never done so.

To speak plainly, the law imposes an impossibility. Were this the ultimate court of appeal I would not hesitate to hold, what is no doubt held locally, that the son of Daulat Singh is quite legitimate enough to succeed to his father's farm. As however the directions given me are so drawn up, it is impossible for the courts of Kumaun to do so. I regret that I have to concur with the learned lower court and dismiss this appeal and feel that in doing so we are acting quite contrary to public opinion in the valleys from which this case comes. We are however accomplishing a task which could not be performed even by the most zealous of Hindu missionaries.

This appeal is dismissed with costs.

RULINGS.

SECTION II.

PRE-EMPTION.

RULINGS

SECTION II.

PRE-EMPTION.

Before Colonel G. E. Erskine, Commissioner.

PARSI SAH JAGATI (SPECIAL APPELLANT-PLAINTIFF) *v.* BIJE RAM, BADRI AND GANGI SAH (SPECIAL RESPONDENTS-DEFENDANTS).

[Special appeal against an order of Mr. F. Giles, Senior Assistant Commissioner, Kumaun, dated the 20th August, 1890, disallowing plaintiff's claim to enforce right of pre-emption against defendant.]

Pre-emption—Claim by near relative not being a co-sharer in the village—History of the custom in Kumaun.

December 15, 1890.

Held that a near relative of the vendor of a share in a village has no right of pre-emption at all, when such relative is not himself a co-sharer in the village.

THE facts of the case appear sufficiently from the orders of the Commissioner and the remand finding of the Senior Assistant Commissioner, which is reproduced in full, as containing a full and valuable discussion regarding the nature and history of the custom of pre-emption in Kumaun and reference to various decisions on the subject.

Pandit Hari Ram Pande for respondents.

PRELIMINARY ORDER BY COL. G. E. ERSKINE, COMMISSIONER.

The share in mauza Bhatgaon of Gangi was sold to Bijai Ram and Badri who were not previously sharers in that village.

Parsi sued to be allowed to exercise the right of pre-emption. He did not distinctly state the grounds upon which he based his claim, and it was dismissed in both the lower courts, on the ground that at the time when the sale took place Parsi had no share in the village, and consequently no right of pre-emption under the usual clause in the *ikrarnama.*

But Parsi objects that, irrespective of the *ikrarnama*, he has a right by the custom of the country. He asserts that he is first cousin of Gangi, the seller, thus:—

BHAGI.

Shib Lal. | Bijai Ram.

Parsi (plaintiff). | Gangi (seller) (respondent).

The issue is, whether, by the custom of the country, a first cousin, who is not a co-sharer of the seller, has a right of pre-emption as against an outsider. This issue has not been dealt with by the lower courts in the present case. The decisions put before me are conflicting. Sir Henry Ramsay in the case of *Dharmanand* (appellant) v. *Ganga Ram* decided on the 3rd August, 1866, that a relation of a seller, not being a co-sharer in the village in which the property sold was situated, had no right of pre-emption as against a co-sharer who was not a relation of the seller.

Mr. Ross, on the 9th December, 1887, in the case of *Kamlapati and Ganga Datt* v. *Purnanand and others* decided "the universal custom is that relatives up to the third generation have the right of pre-emption as against an outsider. Hundreds of cases have been decided according to this rule."

Then there is a decision by Mr. Giles, Senior Assistant Commissioner, in the case of *Lal Singh* v. *Kallian and others,* dated the 6th July, 1888, in which the following passage occurs :—"Subsequently no doubt . . . propinquity of relationship to the seller was grafted on as a fourth qualification for the pre-emptive right. How far relationship is a qualification has been authoritatively settled." The Senior Assistant Commissioner then quotes the case of *Kamlapati* v. *Purnanand*. He concluded by deciding as between Lal Singh and Kallian Bisht, who were both sharers in the village, that Lal Singh being related to the seller in only the fifth degree had no right of pre-emption superior to that of Kallian Bisht who was not related to, though a co-sharer of, the seller. He concluded by remarking that the appellant (Lal Singh) might have had a good case against the stranger Jaideb (who had effected an intermediate purchase).

There is also another case decided by Mr. Ross on the 23rd December, 1887, *Amba Datt* v. *Badri Sah* in which the Commissioner seems to have held that relationship within the third degree did not establish a right of pre-emption where the relation was not also a sharer in the village. But he also gives as a reason for disallowing the claim of the relative of the seller, that the sellers had disposed of their entire village to the purchaser (an outsider) and that the purchaser had a garden near the place.

In this conflict of decisions it is difficult to say what is the customary law among the Hindus in Kumaun.

I therefore remand this case to the lower appellate court—

(1) for explanation as to why it did not in this case follow the authoritative settlement to which it referred in the case *Lal Singh* v. *Kallian Singh*,

(2) for further enquiry into, and finding on, the issue whether, by the custom of the country, the first cousin (not being a co-sharer) of a seller has or has not a right of pre-emption as against an outsider.

The proceedings will be returned to this court for final disposal of the appeal.

I would here note that I regard the question as purely one of the existence or non-existence of such a customary right as is claimed. As to whether it is expedient that such a right should be acknowledged in favour of a relative who has no interest in the village of which the property sold forms a part, I express no opinion.

REMAND FINDING BY MR. F. GILES, SENIOR ASSISTANT COMMISSIONER, KUMAUN, DATED THE 6TH SEPTEMBER, 1890.

With reference to paragraph 1 of the Commissioner's order of remand, I would explain that I did not follow the authoritative settlement to which I referred in the case of *Lal Singh* v. *Kallian Singh*, because I understand the purport of that settlement, pronounced in *Kamlapati* v. *Purnanand* to be that *as between sharers in a village only*, propinquity of relationship to the vendor within the third degree determines right of pre-emption to land sold within that village. Kamlapati and Purnanand were both sharers in the village in which the land sold was situated. In the present case the claimant of the right of pre-emption is a relation of the vendor, but he was not at the time of the sale a sharer in the village in which the land sold is situated.

Paragraph 2 of Commissioner's order.—The claimant has called several witnesses, whose statements I have recorded, to show that mere relationship to a vendor confers right of pre-emption. The evidence of these witnesses is of no practical value. Parsi Sah has filed copy of a decision in the case of

Guman Singh v. *Narain Singh*. In that case the claimant for pre-emption obtained a decree because he was related to the vendor in the eighth or ninth degree and was also a sharer in the village while the vendor was of a different caste to the vendee and was not a sharer in the village. This decision is not germane to the present enquiry, since the pre-emptor's claim was good quite apart from relationship, because he was a co-sharer in the vendor's village and the vendee was not.

Parsi Sah also cited the case of *Biji Sunar* v. *Durga Datt*, etc., in which the value of certain house property in the town of Almora was in question. A right of pre-emption had been decreed and was not disputed on appeal. The property consisted of half a house and the successful claimant for pre-emption was the heir of the vendor and also owner of the other half of the house. The property in dispute was not village land, but here too the pre-emptor already owned a share in the house sold, so that the proceedings throw no light on the rights of a claimant for pre-emption who is not a co-sharer. The third case mentioned by Parsi Sah is that of himself versus Daya Nand, etc.

In this case Pandit Ganga Datt, deputy collector, decreed the pre-emptor's right to Parsi Sah, because the purchasers had no share in the village in which the land sold was situated and were not related to the vendor, while Parsi Sah was his nephew.

Pandit Ganga Datt found that under these circumstances the land was Parsi Sah's ancestral (*maurusi*) property.

This decision was not appealed and with great respect for Pandit Ganga Datt's legal attainments, I should hesitate to assume, solely on the authority of this case, the existence of a right of pre-emption as between Hindus to ancestral property for which I can find no warrant in treatises on Hindu Law, such as those of Mayne and Macnaughten, which is not recognized by the Kumaunis generally and of which I have been unable to find mention in other judicial records filed in this office.

The above constitutes the evidence offered by Parsi Sah in support of his view that a first cousin of a vendor of village land, who is not a co-sharer in the village, enjoys a right of pre-emption against a stranger.

I have made some independent enquiries in respect of the issue indicated by the Commissioner.

In *Govind Dayal* v. *Inayat-ullah* (I. L. R. All., Vol. VII, page 775) the nature of pre-emption was discussed at great length by the local High Court. It was laid down that the doctrine of pre-emption belongs strictly to the Muhammadan Law, but that Hindus who deal with Muhammadans in respect of property, knowing the conditions and obligations under which such property is held, cannot be permitted to evade those conditions and obligations.

Mr. Justice Mahmud held (page 789) that there has never been such a right as that of pre-emption recognized by Hindu Law, though the object of the rule of Hindu Law that prohibits a member of a joint undivided family from selling his share in the joint property is probably similar to that of the law of pre-emption. At page 790 he referred to exceptional local customs of pre-emptive right vesting in Hindu shareholders of a village in which land is sold as against a purchaser who is not a co-sharer.

At page 801 he pointed out that in the Muhammadan Law from which the custom of pre-emption has, where it obtains among Hindus, been borrowed, the cause of pre-emption is the contiguousness of the purchased property whether by co-patnership or vicinage.

In *Jai Ram* v. *Mahabir Rai*, etc. (I. L. R., All., Vol. VII, page 720) it was held in respect of a right of pre-emption recorded in a villoge *wajib-ul-arz*, as between Hindu co-sharers, that partition extinguished the right in the new mahal thereby formed.

At page 726 the dictum pronounced in a former case was quoted and assented to that "an essential condition of a right of pre-emption is, that the parties claiming such a right shall be coparceners in the same estate as those against whom the claim is made, a relation between parties which is extinguished by the very operation of partition and the separate proprietorship thereby established."

In *Dharmanand* v. *Ganga Ram* the Commissioner (Sir H. Ramsay) laid down on appeal that "the object of pre-emption is to secure village proprietors against injurious intrusion of outsiders—not to secure the rights of distant relatives." In this case the vendee was not a relation of the vendor, and indeed was of a different caste, but he was a sharer in the village in which the land sold was situated. The claimant for pre-emption on the other hand was a relation of the vendor, but he was not a sharer in the village and he lost his case.

In *Amba Datt* v. *Biji Ram* the Commissioner (Mr. Ross) found that the appellant was within "the degree of relationship for which pre-emptiom is allowed" but he was not a shareholder in the village and therefore could not claim pre-emption.

This claim very clearly illustrates the explanation afforded above as to the first paragraph of the order of remand now under reply.

In *Joga Singh* v. *Chanar Singh* the Commissioner (Mr. Ross) held that Joga, though he was qualified for pre-emption qua relationship, had no connection with the village, and therefore could not claim pre-emption. I have consulted the sadar amin and his opinion is submitted herewith. It is to the effect that heretofore there has been no fixed rule as to pre-emption but every hakim has decided as seemed best in his own eyes. In the sadar amin's view cousins should enjoy a right of pre-emption as heirs, whether or not they are co-sharers, and he says that formerly the most distant relations to the vendor could claim pre-emption. As I have indicated I can find no judicial precedent for this extreme view and the suit now under consideration was, at the original hearing, dismissed by the sadar amin himself, because the claimant for pre-emption was not a sharer in the vendor's village.

There seems to be some confusion in the minds both of the sadar amin and Pandit Ganga Datt between pre-emption, which is a right in respect of property conveyed to another by a living person, an heirship which concerns title to the property left behind him by a person deceased.

Further enquiry then has only served to strengthen the opinions I have already expressed as to the nature of the pre-emptive right in regard to village land in Kumaun. I understand that ownership of a share in the village in which the land sold is situated is the first requisite for pre-emption; but that as between co-sharers who are claimants to the right superior propinquity of relationship to the vendor within the third degree confers preference. This qualification has, I believe, been grafted on to the original custom which was itself unknown under the Hindu administrations of the Chand Rajas and the Gurkhas and was borrowed from the Muhammadan Law and introduced into Kumaun by British officials for political purposes.

I can find no justification for the view that relationship to the vendor, however near, can in itself and apart from ownership of a share in the village, support a claim for pre-emption to village land in Kumaun.

The papers are again submitted to the Commissioner, together with the complete records of the cases herein referred to.

Final order by Colonel G. E. Erskine, Commissioner, dated the 16th December, 1890.

Read further proceedings of the lower appellate court, dated the 6th September, 1890.

I have now no hesitation in ruling that neither under settlement arrangements, nor under Hindu Law, nor under the custom in Kumaun, has the relative of the vendor of property in village land any right of pre-emption against a purchaser who is not related to the vendor, whether that purchaser is, or is not, a co-sharer in the village of the vendor. At the time when Badri purchased the share of Gangi, the plaintiff (special appellant) had no share in mauza Bhatgaon. Consequently he had no right of pre-emption.

Special appeal dismissed.

Before Mr. F. Giles, C.S., Officiating Commissioner.

DAT RAM PUJARI, MAUZA ANETHA (APPELLANT-PLAINTIFF) *v.* RAGHUNATH AND JAYA NAND (PURCHASERS) AND GAURI DATT (SELLER) (RESPONDENTS-DEFENDANTS).

[Special civil appeal no. 7.]

Appeal against an order of Mr. W. R. Partridge, C.S., Senior Assistant Commissioner, Garhwal, dated the 28th April, 1891.

Pre-emption—Asl (*principal*) *village and* laga (*hamlet*)—*Co-sharer in one but not in the other.* *July 11, 1891.*

Held that for the purposes of pre-emption the *asl* (principal) village and *laga* (hamlet or offshoot) are one. Where a purchaser of a share in a *laga* was already a co-sharer in the *asl* village, it was held that a co-sharer in the *laga* had no right of pre-emption against him.

In the hills *lagas* or subsidiary villages are often attached to *asl* or principal villages: they possess separate maps and records of proprietary rights but are held under one revenue engagement with the principal village. In this case Jwalpasera is a *laga* of Anetha. The purchasers, Raghunath and Jaya Nand, were already co-sharers in Anetha, but not in Jwalpasera.

Gauri Datt sold them his share in Jwalpasera and Dat Ram, another co-sharer in Jwalpasera (as well as in the principal village) claimed the right of pre-emption.

The claim was rejected in all the courts.

ORDER BY MR. F. GILES, COMMISSIONER.

I have no doubt that the decisions of the lower courts are correct. The object of the peculiar custom of pre-emption of village land in Kumaun is to exclude strangers and the pre-emption right obtains only against outsiders. It does not take effect against a purchaser who has an interest in the village in which land is sold whether his share is recorded in the *asli* village or *laga*. For the purpose of pre-emption as for other purposes the *asli* village and the *laga* are one.

Appeal is dismissed with costs.

Before Mr. D. T. Roberts, C.S., Commissioner.

MOTI NAYAL, MAUZA BHAGOTI (APPELLANT-PLAINTIFF) *v.* LAL SINGH (VENDOR) AND BACHI (PURCHASER) (RESPONDENTS-DEFENDANTS).

[Civil appeal no. 17 of 1893.]

Appeal against an order of Colonel G. E. Reade, Assistant Commissioner, Almora, dated the 17th May, 1893.

Pre-emption—Claim by co-sharer by purchase.

August 16, 1893.

A co-sharer, who has himself become a co-sharer by purchase, has the same right of pre-emption as any other co-sharer in the village.

THE order of the court explains the facts sufficiently.

Pandit Badri Datt Joshi, vakil, for appellant.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

The Assistant Commissioner's order is plainly incorrect. The plaintiff pre-emptor, though he became a hissadar by purchase 12 years ago, is nevertheless a hissadar, and against a new purchaser has the same right of pre-emption under the *wajib-ul-arz* as any other purchaser. He has made no delay in perferring his claim as it was made in one month after the defendant purchaser received possession.

The order of the lower court is reversed and a decree given in favour of the plaintiff entitling him to receive the land on payment of the purchase money, Rs. 100, together with the cost of the suit in the lower court.

The costs of this appeal to be borne by the respondents.

Before Colonel E. E. Grigg, Commissioner.

ROSHAN DIN AND ALI BAKHSH, ALMORA (APPELLANTS-PLAINTIFFS) *v.*
(1) MUKIM (VENDOR) AND (2) LACHMI BALLABH
(RESPONDENTS-DEFENDANTS).

[Regular civil appeal no. 1 of 1893.]

Appeal against an order of Colonel G. E. Reade, Assistant Commissioner, Almora, dated the 1st November, 1893.

April 27, 1894.

*Pre-emption—Town lots in Almora—Muhammadans—*Shara Muhammadi *not followed by Almora Muhammadans.*

Held that the custom of pre-emption extends to town lots in Almora, that pre-emption can be claimed by a joint co-sharer with the vendor, and that Almora Muhammadans do not observe the legal forms of the *Shara Muhammadi* but follow the local rules applicable to Hindus. The court also expressed the opinion that among local Muhammadans a claim of pre-emption by a near relative as such (not a co-sharer) might also be entertained.

IN this case one Mukim sold a plot of land in Almora town to Lachmi Ballabh. Ali Bakhsh and Roshan Din, plaintiffs, were the brothers of the vendor and claimed pre-emption, alleging that the plot was part of the ancestral land owned jointly by themselves and Mukim.

The case was remanded for further enquiry as to local custom by Mr. D. T. Roberts, Commissioner, and finally decided by Colonel E. E. Grigg, Commissioner.

The remand report by Mr. Sturt, Deputy Commissioner, stated that the custom of pre-emption obtained in Almora town, that relatives of vendors were entitled to pre-emption, and that the rights of co-sharers were not recognized; there was no memorandum of customs for the urban area.

It will be seen that the Commissioner, though his order and findings are not clearly put, did not accept the above report as regards custom, but decreed the claim on the ground of plaintiffs being co-sharers with the vendor.

Babu Din Dayal for respondents.

INTERMEDIATE ORDER BY MR. D. T. ROBERTS, COMMISSIONER, DATED THE 5TH APRIL, 1893.

It transpires that there is another similar suit pending concerning land granted or sold by another brother and the appeal in that case lies to the Deputy Commissioner. The two cases will throw some light on each other, most probably.

On the facts there is strong evidence that Ali Bakhsh was present at the sale and waived his right of pre-emption, but there is a little difference in one particular. Witness Manorath, who was examined on commission, says Ali Bakhsh was asked to witness the deed and refused, because he was at Almora without leave. This seems a very inadequate reason for refusal. Another says he (Ali Bakhsh) was not asked to sign.

It is certainly a singular omission that if Ali Bakhsh was present and was consenting to the sale he did not witness the deed. Ali Bakhsh says he was not at Almora at the day of the sale, but was at his post at Ranikhet where he is the dak bungalow khansama. He has filed a certificate somewhat indefinite of Major Stawell: and refers to entries in the dak bungalow to prove his presence at Ranikhet.

They don't *prove* this by any means but they give indications where proof may be had and he should, under the circumstances, be allowed to give proof, if possible, that he was at Ranikhet on the 28th November, 1891. There are also some preliminary points to be proved. It is not clear whether a right of pre-emption exists in the case or not. The claim apparently is under local custom not under Muhammadan Law, because the special requirements of the Muhammadan Law had not been complied with.

It is first therefore to be decided whether a custom holds in Almora or not, and if it does, does the right of pre-emption extend to both Ali Bakhsh and Roshan Din or to Ali Bakhsh only, and if it extends to Roshan Din also, what effect that has on the claim—supposing it proved that Ali Bukhsh consented to the sale.

I therefore remand the case for further enquiry and a finding of the lower court on the following points :—

(1) By custom is there a right of pre-emption in the locality, i.e. Almora town where this land is situate?

(2) If there is a right, to whom does it extend and have Ali Bakhsh and Roshan Din both a right of pre-emption, or has Ali Bakhsh alone the right?

(3) Was Ali Bakhsh present at the time the deed of sale was written?

(4) If Ali Bakhsh by his presence waived his right of pre-emption, does the right of Roshan Din (if he has any) continue, or are there any circumstances to show waiver of his right also?

Cases to be returned after findings on the above points.

FINAL ORDER BY COLONEL E. E. GRIGG, COMMISSIONER.

No notice has been served on Mukim's heirs. But inasmuch as this appeal is in reality between appellants and the purchaser, Lachmi Ballabh, this omission may be passed over. Roshan Din asserts he has a share inasmuch as he obtained a share in his deceased brother (Bakhshi's) share of the property. A notice of court, dated the 29th October, 1888, for mutation of names on the death of Fahim was served at the instance of Ali Bakhsh, and on this Ali Bakhsh states mutation of names was effected in the names of Ali Bakhsh, Mukim, Mula, Mujnu and Bakhshi's widow. It may be remarked that in the report of the 4th January, 1894, Fahim's name was found entered in the revenue register up to the 23rd April, 1892, when Lachmi Bullabh's name was recorded in respect to 4/16 out of 13/16 of no. 545 whilst Fahim's name remained in respect of 9/16 of this plot. From this, and the fact that Fahim has been dead for the last six years, it is evident the revenue registers are not posted up-to-date.

But Roshan Din states that he is a reversioner of Bakhshi's share. That he has since Bakhshi's death supported the widow, and his claim to succeed to Bakhshi's share on the death of the latter's widow is admitted by Mujnu and Ali Bakhsh, both of whom are present. From this it would appear that Roshan Din is a presumptive sharer in the property left by Fahim, although in respect to his original share he was compensated.

This disposes of the question of Roshan Din's claiming as a prospective sharer in the ancestral property. I do not thus consider it is necessary to discuss the question of a relative claiming the right of pre-emption. Though I may be permitted to say that cases may arise when such a claim advanced even by Musalmans should be entertained.

The origin of these three cases appears to have been the desire of Lachmi Ballabh to acquire a piece of land which is situated near his shop. In Kidri's case (special appeal no. 11 of 1893) the document executed was first found to be a deed of gift. But after a long enquiry it was held to be a deed of sale. The plea set up by Lachmi Ballabh was evidently with the object of defeating a claim for pre-emption. There are two suits regarding the share sold by Mukim. The first was instituted by Roshan Din and Ali Bakhsh on the 29th March, 1892, and the second by Mujnu on the 19th November, 1892. They are the subjects of appeals nos. 1 and 12 of 1893. In the former Roshan Din and Ali Bakhsh are appellants and in the latter Lachmi Ballabh. There is also a third case (appeal no. 11) in respect to the sale effected by Kidri. In this case Roshan Din and Ali Bakhsh are the plaintiffs and Lachmi Ballabh and Kidri the defendant. Lachmi Ballabh is the appellant in this last case.

The questions I am called upon to decide are (1) whether Roshan Din as a relative only can claim? and (2) whether the custom in Almora town admits of claims for pre-emption by Musalmans? There is also a third point which is whether Musalmans in the same manner as Hindus are by the *lex loci* entitled to claim pre-emption. With regard to the first point, I have already found that Roshan Din comes forward, in reality, as a sharer. As to the second point, I find, as far back as the 6th August, 1855, Sir Henry Ramsay in re *Musammat Gulabi, widow of Rahmat-ullah* v. *Hargobind* admitted the right of pre-emption in the town of Almora.

There is also the case of *Asgar Ali* v. *Haidar Ali* decided on the 21st November, 1883, by the sadar amin. Again *Madar Bakhsh* v. *Khuda Bakhsh, son of Kirdi*, decided on the 5th January, 1887, by the sadar amin.

These decisions show very clearly that the right of pre-emption in the town of Almora has been admitted to exist, and that legal forms enjoined by the *Shara Muhammadi* have not in any of the cases been considered as applicable to the Musalmans residing in Almora, who are apparently in this respect guided by the rules applicable to Hindus. This disposes of the second and third points. I therefore hold that Roshan Din, Ali Bakhsh and Mujnu are entitled to the relief sought.

In this appeal I decree to Roshan Din and Ali Bakhsh the right of pre-emption in repect to a 9 pie share on payment of Rs. 15 to Lachmi Ballabh within one month. In default the sale to Lachmi Ballabh will hold good. Respondent will pay all the costs of the suit.

Before Colonel T. W. Quin, Commissioner.

PAN SINGH OF MAUZA SANANA (APPELLANT-DEFENDANT) *v.* DAN SINGH OF DITTO (RESPONDENT-PLAINTIFF).

[Special civil appeal no. 20 of 1896.]

August 20, 1896.

Pre-emption—Claim by hissadar against khaikar purchaser.

Held that a co-sharer in a village has a right of pre-emption against a khaikar of the village, who has purchased a proprietary share.

PAN SINGH, a khaikar in mauza Sanana, purchased a proprietary share in the village from Bhona Sah and Rama Sah. Dan Singh, a hissadar of the village, claimed pre-emption. The *wajib-ul-urz* gives the right of pre-emption to hissadars of the village against all non-hissadars and makes no mention of khaikars. Its provisions were therefore followed.

Pandit Hari Ram Pande for respondent.

ORDER BY COLONEL T. W. QUIN, COMMISSIONER.

I can find nothing that would justify me in holding that the appellant, who is a khaikar in Sanana village, has right of pre-emption in a share in that village, as against an actual shareholder therein. The terms of the *wajib-ul-arz* are quite clear, and without going into the question of relationship, I consider that the respondent has clearly a preferential right to purchase the share now in suit as compared with the appellant. I therefore dismiss the appeal, but under the circumstances of the [case] order that each party do pay its own costs.

Before Mr. R. E. Hamblin, C.S., Commissioner.

JOGA NAND AND AMBA DATT, JOSHIS, OF MAUZA SERON, ALMORA
(APPELLANTS-PLAINTIFFS) *v.* AMBA DATT AND
SHIB DATT OF DITTO
(RESPONDENTS-DEFENDANTS).

[Special civil appeal no. 4 of 1901.]

Second appeal against an order of Mr. A. W. McNair, C.S., Deputy Commissioner, Garhwal, dated the 15th November, 1900.

May 8, 1901.

Pre-emption—Previous sale under condition reserving right of re-purchase—Claim of pre-emption by near relative of vendor.

Certain land was sold in 1859 under a condition that in the event of a re-sale the then vendor or his representatives should have the first refusal of the property. Part of the land was sold in 1900 in accordance with this condition to a descendant of the original vendor. The brother of the present vendor claimed pre-emption as a near relative and co-sharer.

It was *held* that the contractual stipulation overrode and took priority of the ordinary rights of pre-emption.

THE facts appear sufficiently from the judgement of the court.

Pandit Hari Ram for appellants ; and *Pandit Badri Datt* for respondents.

ORDER BY MR. R. E. HAMBLIN, COMMISSIONER.

Both parties are present and appellant is heard. This is a second civil appeal. Plaintiff-appellant's brother has sold his property to Amba Datt, defendant, and plaintiff-appellant has claimed pre-emption. The basis of the sale to defendant is that by virtue of a deed of sale of 1859 the property, part of which is now in suit, was sold by defendant's ancestor to plaintiff's brother's ancestor with the condition that in case the sale took place the defendant's ancestor should have the first offer of the property. Part of the property was sold subject to this condition in 1882 and the sale was upheld in court. Plaintiff's brother has now sold another part to defendants.

Plaintiff objects to this purchase and claims pre-emption on the grounds (1) that Amba Datt is not a legitimate descendant of the original seller in 1859, and is not therefore entitled to the benefit of the condition in that contract regarding re-purchase, (2) that such condition regarding re-purchase does not override plaintiff's ordinary rights of pre-emption as a near relation arising from Kumaun custom and settlement *wajib-ul-arz* (3) that admitting even that defendant has rights of re-purchase, those of pre-emption of the plaintiff's are paramount as he is a brother of the present seller and a co-sharer, whilst Amba Datt is neither a co-sharer nor a relation.

The first ground of legitimacy is a question of fact which cannot be raised in second appeal. As regards the second and third grounds I am clearly of opinion that the rights of re-purchase given by the sale of 1859 are not restricted by any custom of pre-emption among co-sharers or near relations. The present seller to Amba Datt received this property through his ancestors from the original vendor in 1859 subject to the condition that that vendor's family should always have the first right to re-purchase. Any other rights of pre-emption that may be claimed are subordinate to this original right created by the deed of sale. The appeal therefore is dismissed with costs.

Before Mr. R. E. Hamblin, C. S., Commissioner.

JAI KISHAN AND OTHERS *v.* MAHESHANAND AND ANOTHER.

[Special civil appeal no. 11 of 1901.]

Second appeal against order of Mr. A. W. McNair, C.S., Deputy Commissioner, Garhwal, dated the 22nd June, 1901.

Pre-emption—Buildings.

December 23, 1901.

Held that so far as the evidence in this case went there is no right of pre-emption in Kumaun in respect of houses (as distinct from land).

THE facts of the case appear sufficiently from the judgement of the court.

It is to be noted that the sale in question only conveyed the building, without the site on which it stood; also that where land had been sold with buildings standing on it, pre-emption has regularly been allowed in respect of both joint items of the property.

ORDER BY MR. R. E. HAMBLIN, COMMISSIONER.

Parties were heard on the 29th November, 1901. This is a second civil appeal and turns on the point whether appellant-plaintiffs as hissadars in the village have a right of pre-emption regarding a shop in the village sold by one shop-keeper to another; both shop-keepers are respondents. There is no question as regards ownership of the land; the land has been held to be the property of plaintiffs, and it has been held that they can claim ground rent for it; instead of so doing they have claimed pre-emption. They rely on the *wajib-ul-arz*, but this refers only to the land of the village and not to the houses; they have given no proof that pre-emption has ever been allowed in respect of houses; they have produced no rulings. The appeal is dismissed with costs.

Before Mr. R. E. Hamblin, C. S., Commissioner.

NARAIN SINGH AND TEK SINGH, MAUZA BAINA (APPELLANTS-DEFENDANTS) *v.* CHANAR SINGH BISHT OF MAUZA TIMLI (RESPONDENT-PLAINTIFF).

[Special civil appeal no. 15 of 1901.]

Second appeal against an order of Mr. J. S. C. Davis, C. S., Deputy Commissioner, Almora, dated the 28th June, 1901.

May 2, 1902.

Pre-emption—Procedure—Claim by hissadar in respect of proprietary right in a khaikari village.

Held that a co-sharer (hissadar) has a right of pre-emption in respect of the hissadari right in a wholly khaikari village as against a purchaser who is a khaikar of the village.

IN this case Gopal Singh, owner of the proprietary right over certain land in mauza Baina, a village held entirely by *pakka* khaikars, had sold his right to Narain Singh and Tek Singh, two of the *pakka* khaikars of the village. Pre-emption was claimed by Trilok Singh and Chanar Singh, two of the other proprietors. Apart from other findings immaterial to the question of custom, it was held that a hissadar has a right of pre-emption against a *pakka* khaikar, who has purchased the proprietary right over his (or other's) land in the village.

Babu Din Dayal for appellants.

ORDER BY MR. R. E. HAMBLIN, COMMISSIONER.

Parties were heard on the 29th November, 1901. This is a civil second appeal. In the first court Trilok Singh and Chanar Singh sued Narain Singh and Tek Singh, purchasers, and Gopal Singh, vendor, claiming the right of pre-emption with respect to the property sold by Gopal Singh to Narain Singh and Tek Singh.

The lower court framed the issues (1) had the plaintiff the first refusal of the land offered him and did he refuse it ? (2) if so, has he thereby forfeited his right to sue ? (3) if he has such right, on what terms is he entitled to pre-emption ? It will be noticed that in these issues the word "plaintiff" is used and not "plaintiffs." The first court evidently regarded Trilok Singh as the real plaintiff and representing Chanar Singh, as it was he to whom the property had been offered. The lower court enters in its judgement that Chanar Singh is the minor brother of Trilok Singh. The lower court found that Trilok Singh had been given the chance of purchase and had refused and so had lost his right of pre-emption and dismissed the suit with costs. The second court has given Chanar Singh a decree for pre-emption, on the ground that he had not been given the chance of purchase, and it also remanded the case to the lower court under section 562 to determine the price at which pre-emption should be allowed. The first court has accordingly fixed a price and given a decree for pre-emption at this price. The procedure is incorrect. The second court should have framed an issue under section 566 and on receipt of the return on that issue should have passed its final decree. It was not able to remand the case under section 562 and at the same time modify the decree of the first court as it did. This is an illegality justifying second appeal. I must cancel the order remanding the case under section 562 so as to dispose of the decree of the first court which has been prepared in accordance therewith. I am not able at present to pass final orders in the case as the decision of the following issues is necessary before I can do so :—

(1) Was Chanar Singh an adult or minor at the time the offer of the property was made to Trilok Singh ?

(2) Was Trilok Singh acting for himself alone or on behalf of Chanar Singh and possibly others of the family when he declined the purchase ?

(3) If Chanar Singh was a minor at such a time, did Trilok Singh always act on his behalf ?

(4) Was Chanar Singh a recorded hissadar at the time of the offer, and, if not, has he any right of pre-emption ?

(5) In a village in which the hissadars have no *khud* cultivation, has a hissadar any right of pre-emption regarding a sale of hissadari right in which the vendee is a khaikar in the village ?

(6) If Chanar Singh has any right of pre-emption, on what terms should pre-emption be allowed ?

The appeal is allowed because the order of the second court is contary to law and because the decision of further issues is necessary before final orders can be given. The case is returned to the second court under section 566 of the Civil Procedure Code for trial of the above issues and re-submission with the findings within two months.

2nd May, 1902.

The Deputy Commissioner has returned his findings and appellant has been heard. The appellant has filed a list of objections which I overrule. The findings on my issues 1, 2, 3 and 4 are findings of fact which I cannot alter. Finding on issue 5 is one of law and I agree with the decision. Finding on issue 6 is also one of fact, and though appellant objects to the evidence on which the Deputy Commissioner acted, he placed no other evidence before the Deputy Commissioner regarding the value of the right of pre-emption.

My first order of the 9th December, 1901, allowed the appeal. My order cancelling the Deputy Commissioner's decree allowed the decree of the first court to revive. I therefore now set aside all previous decrees, and give Chanar Singh a decree for exercise of the right of pre-emption in respect of the land in dispute on his paying to appellants-vendees the sum of Rs. 320 within three months from this date, and if he fails to pay, his claim for pre-emption stands dismissed with costs in all courts. Subject to this eventuality, Chanar Singh is entitled to costs in all courts.

Before Mr. R.E. Hamblin, C.S., Commissioner.

GAJADHAR JAYAL, MAUZA JHANJAR (APPELLANT-PLAINTIFF) *v.* JORA AND OTHERS, MAUZA KANDI (RESPONDENTS-DEFENDANTS).

[Special civil appeal no. 10 of 1902.]

Second appeal against an order of Mr. E. C. Allen, C. S., Deputy Commissioner, Garhwal, dated the 10th March, 1902.

Pre-emption—Waiver of claim on previous occasions—Object of the custom—Non-resident co-sharer.

July 28, 1902.

Failure to claim pre-emption when land is sold on one occasion does not debar a claim in respect of a subsequent sale of the same property.

This follows from a consideration of the object of the custom, viz. to enable co-sharers to exclude undesirable outsiders. In view of the wording of the *wajib-ul-arz* in Garhwal, *held* that a non-resident co-sharer has no right of pre-emption.

JORA, the vendor, had sold 76 nalis of land in mauza Kandi to Kedaru, who was not a co-sharer in that village. Pre-emption was claimed by Gajadhar, who was a co-sharer of the village but resided in another village. His claim was dismissed on the basis of a provision in the Garhwal memorandum of village customs restricting pre-emption to resident co-sharers of the village.

This ruling has been referred to and not followed in respect of Almora and Naini Tal districts by Mr. J. S. Campbell in *Lechi Negi* v. *Joga and another* (q.v.). The circumstances of that case however were distinguishable from this case, the claim there being based on near relationship to the vendor. Mr. Campbell would also from his *obiter dicta* dissent from the principle laid down in this case in Garhwal cases also.

Babu Din Dayal for the appellant.

ORDER BY MR. R. E. HAMBLIN, COMMISSIONER.

Parties were heard on the 13th June; this is a second civil appeal and can be heard on any of the grounds given in section 584, Code of Civil Procedure. Plaintiff-appellant has claimed pre-emption with respect to a sale by Jora to Kedaru. The courts below have taken the view that as plaintiff did not claim pre-emption at the time Jora purchased at auction he can have no right to pre-emption now when Jora sells. They have overlooked the fact that by the ruling entered in *Weekly Notes*, page 115 of 1898, there can be no pre-emption with respect to a sale at auction by order of a court in execution of a civil court decree; they have also overlooked the principle on which pre-emption is based. It does not follow that because *X* has no objection to a purchase by *B* from *A* that he will not have any objection to a purchase by *C* from *B*. Pre-emption is based on the necessity of giving co-sharers the power to exclude undesirable new members of a proprietary body. *X* may have a liking for *B* and consider him desirable as a co-sharer; he may have the strongest objection to *C*, and think him very undesirable as a co-sharer. The lower courts have taken the view that because a co-sharer once declines to exercise the right of pre-emption with respect to a particular property he is therefore unable in any future year to claim pre-emption with respect to any future sale of that same property; such a view is wrong.

But the appellant cannot succeed is his appeal before me for his basis of claim is the *wajib-ul-arz* and this only gives a right of pre-emption to resident co-sharers. Plaintiff's residence is not in the village, and he cannot therefore claim to be a resident co-sharer. If appellant had asserted in his grounds of appeal that he was a resident co-sharer, I would have felt it necessary to return this issue to the second court for decision; he has contented himself with asserting he has the right to pre-emption; he has not objected to the finding of the first court that he is non-resident, and so I dismiss the appeal with costs.

No. 24/VII—263c/69, dated the 19th January, 1904.

Order of the United Provinces Government on Gajadhar's appealing against the above judgement of Commissioner, dated the 14th *January*, 1904.

ORDER.—Ordered that the petitioner be informed that Government declines to refer the above case to the High Court.

A. F. FREMANTLE,
Under Secy. to Govt., United Provinces.

To—Commissioner, Kumaun division.

Before Mr. J. S. Campbell, C.S.I., C.I.E., C.S., Commissioner.

RABI DATT, BIDYA DATT, ARYA DATT OF MAUZA THAPLI, PATTI KAPHOLSYUN, GARHWAL DISTRICT (APPELLANTS) *v.* PARJA PATTI OF MAUZA JAKH, PATTI KAPHOLSYUN, GARHWAL DISTRICT (RESPONDENT).

[Special civil appeal no. 9 of 1909.]

Appeal against an order of Mr. V. A. Stowell, C.S., Deputy Commissioner, Garhwal, dated the 2nd January, 1909.

July 17, 1909.

Pe-emption—Claim by near relative of vendor but not resident co-sharer against resident co-sharer purchaser.

Held that a near relative of the vendor, who was also a co-sharer in the village but was non-resident, had no right of pre-emption, against a resident co-sharer who was unrelated to the vendor.

IN this case the claimant of pre-emption was related to the vendor within the third degree and was a co-sharer in the village, but was non-resident. The purchaser was a resident co-sharer in the village, being a khaikar who had previously purchased a proprietary share.

The bar of non-residence was held to override the usual prior right of the near relative. The land was ancestral.

This ruling was subsequently reversed by Mr. Campbell himself in two rulings of 1913 (*Lachi* v. *Joga and another* and *Narain Datt* v. *Bhola Datt and others*).

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I see no reason to interfere with the Deputy Commissioner's finding in this case.

Appellants are non-resident hissadars of a purely khaikari village. Respondent is not only one of the resident body of khaikars, but has already on a previous occasion acquired some hissadari rights by purchase. He is therefore a resident hissadar as well as a resident khaikar. I do not consider that appellants are entitled on the grounds of relationship to pre-emption in preference to respondent.

I therefore uphold the Deputy Commissioner's order and dismiss this appeal with costs.

Pandit Tara Datt, vakil, for appellant; and *Pandit Mathura Datt Pande* for respondent.

Before Mr. J. S. Campbell, C.S.I., C.I.E., C.S., Commissioner.

LACHI NEGI, SON OF JOGA NEGI, OF MAUZA BAGETI, UCHYUR (APPELLANT-PLAINTIFF) *v.* (1) JOGA, SON OF LAL SINGH OF
DITTO (2) GUSAIN, SON OF JOGA NEGI OF
DITTO (RESPONDENTS-DEFENDANTS).

[Special civil appeal no. 80 of 1912.]

Appeal against an order of Mr. C. E. D. Peters, C.S., Deputy Commissioner, Almora, dated the 30th September, 1912.

Pre-emption—Claim by non-resident co-sharer—Record of village customs. *March 31, 1913.*

Held that a non-resident co-sharer, who was related to the vendor within the third degree, was entitled to pre-emption against a purchaser who was a resident co-sharer of the village but was not related to the vendor; to keep the family intact is a more important object of the custom of pre-emption than to keep undesirable outsiders out of the village community.

THE facts of this case appear sufficiently from the judgement. This ruling, which relates to the Almora district, dissents from that of Mr. Hamblin, Commissioner, in the case *Gajadhar* v. *Jora* (q. v.) which was a Garhwal case. The circumstances however are not the same, as in the Garhwal case the claimant was not a near relative of the vendor. The latter ruling was based on a clause in the Garhwal memorandum of village customs, which is not found in the records of the other two districts. Mr. Campbell would, it appears, dissent from that ruling in Garhwal cases also. In this case he directly reversed his own ruling in *Rabi Datt and others* v. *Parjapati* (July 17, 1909) (q. v.).

Pandit Badri Datt Joshi for appellant; and *Pandit Lachmi Datt Pande* for respondent.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I am unable to concur with the Deputy Commissioner's findings in the case which raises an important question whether a non-resident co-sharer can never claim pre-emption.

In this case Lachi, appellant, Gusain, respondent no. 2, and a third brother, Moti, are recorded as the joint co-sharers in an ancestral property. Gusain has sold his share to Joga, a resident co-sharer, and the question now in dispute is whether Lachi, being admittedly non-resident can claim pre-emption as against Joga. I think that, according to the Kumaun custom he most undoubtedly can do so. The object of pre-emption is *first* of all to keep the family intact, and next to keep undesirable aliens out of the village community. But in my opinion much more importance has to be attached to the first object than to the second.

There are of course numerous rulings to the effect that a distant relation, who is not a co-sharer, cannot claim pre-emption as against a co-sharer; but they do not affect the present case, where the three brothers hold a joint undivided *khata*.

To insist that no one but a resident co-sharer can claim pre-emption would be, in my opinion, contrary to custom and would entail great hardship in many cases. No government servant or professional man could ask for pre-emption during the time he was absent from his ancestral home; and no man with property in more than one village could ask for pre-emption except in the one village in which he resides.

The question is somewhat more difficult in Garhwal, owing to a reference to the " resident " co-sharer having crept into the memorandum of village customs at Mr. Pauw's settlement, but even there there is no reference to any necessity for the nearest kinsman being a *resident* co-sharer. Any kinsman within the third generation who is a co-sharer has a preferential claim for pre-emption as against a resident co-sharer, as I read the memorandum. I am not prepared to accept the *obiter dictum* of Mr. Stowell that a man must be a resident co-sharer before he can claim pre-emption.

Mr. Hamblins' ruling in *Gajadhar Jayal* v. *Jora* that a non-resident co-sharer has no right of pre-emption is entirely based upon the Garhwal memorandum of village custom.

But there is nothing in Mr. Beckett's *ikrarnama* or Mr. Goudge's memorandum of village custom to indicate the extension of this principle to the Almora and Naini Tal districts, and I find that it is opposed to both local custom and public policy.

I therefore reverse the order of the lower court in this case and order that if plaintiff-appellant pay Rs. 100 into court within three months of this date, he shall be allowed pre-emption of the land sold by respondent no. 2 to respondent no. 1.

Respondent no. 1 will pay appellant's costs in all courts.

Before Mr. J. S. Campbell, C.S.I., C.I.E., C.S., Commissioner,

NARAIN DATT JOSHI OF MAUZA AKHORIA, PATTI WALLA
GIWAR, ALMORA DISTRICT (APPELLANT) v. BHOLA
DATT, GANGA DATT AND PURNANAND
JOSHIS OF DUBKIA, ALMORA (RESPONDENTS).

[Special civil appeal no. 37 of 1913.]

Appeal against an order of Mr. C. E. D. Peters, C.S., Deputy Commissioner, Almora, dated the 15th February, 1913.

Pre-emption—Claim by near relative who was a non-resident co-sharer against resident co-sharer purchaser—Non-ancestral land. *August 17, 1913.*

Held that the vendor's brother, who was also a co-sharer in the village but was non-resident, was entitled to pre-emption against a purchaser who was a resident co-sharer even in respect of non-ancestral land.

IN this case the court following the ruling in *Lachi* v. *Joga and another*, which reversed its previous ruling in *Rabi Datt and another* v. *Parjapati*, allowed the pre-emptive claim of a near relative, who was non-resident, against an unrelated purchaser, who was a resident co-sharer, and further extended the principle to non-ancestral land, this latter extension being subsequently reversed in a later ruling of 1915 (*Parjapati* v. *Kirpal Singh and another*).

The facts so far as they are material appear from the court's order. The ruling quoted by the appellant was *Lachi* v. *Joga and another*.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I am unable to agree with the findings of the lower courts in this case. Appellant is own brother to the vendor, and also a hissadar in the village in his own right. As such (for the reasons given in the ruling quoted by appellant) I hold that he is better entitled to pre-emption than other co-sharers, who are not related to the vendor, even though the land be non-ancestral, and though appellant be non-resident. I therefore quash the orders of the lower courts and order that if appellant pay Rs. 400 into court within three months of this date, he shall be given pre-emption of the land claimed by him and his costs in all courts against Bhola Datt, and Ganga Datt who have disputed his prior claim.

Pandit Luxmi Datt Pande, vakil, for appellant; respondent absent.

Before Mr. J.S.Campbell, C.S.I., C.I.E., C.S., Commissioner.

NAROTAM, SON OF BACHI RAM, AND GANGA RAM, SON OF JAI KISHEN, GUTHOLIA OF MAUZA NAYA LATAULI, PATTI MAHRURI, NAINI TAL (APPELLANTS) *v.* (1) MRS. ROCHFORT AND (2) MR. ROCHFORT OF SITLA BAGICHA (VENDEES) AND (3) MANORATH, SON OF NAND RAM, GUTHOLIA, OF NAYA LATAULI (RESPONDENTS-DEFENDANTS).

[Special civil appeal no. 57 of 1913.]

Appeal against an order of M. Fasih-ud-din Ahmad, Khan Bahadur, Officiating Deputy Commissioner, Naini Tal, dated the 13th June, 1913.

September 13, 1913.

Pre-emption—Removal of village to new site granted by Government—Maintainance of former custom.

Where a village was acquired by Government for a public purpose, and the villagers were given a nayabad grant of State land, to which they transferred themselves and founded a new village, it was held that, although no new record of village customs had been framed, the status of the village remained the same and the old recorded custom of pre-emption should be followed.

THE facts of the case appear sufficiently from the judgement of the court.

Babu Din Dayal for appellant, and *Pandit Bhola Datt Pande* for respondents.

ORDER BY MR. J. S. CAMPBELL, COMMISSIONER.

I am unable to agree with the findings of the lower courts in this case.

The village of (old) Latauli was acquired by Government for public purposes, and as an act of grace Government gave the dispossessed village community a nayabad grant, including the land now in dispute, upon which to re-establish themselves : and they transferred themselves there bodily and called the grant "Naya Latauli." No new record of village customs was recorded (it is not usual) for the nayabad grant which was assessed to revenue by summary settlement. In old Latauli the custom of pre-emption existed and was recorded (as elsewhere in the Almora district) in the settlement papers. I consider that the status of the village community was exactly the same in new Latauli as it had been in old Latauli, and that therefore the hissadars were entitled to resort to pre-emption to keep outsiders from entry into the nayabad grant. The fact that no pre-emption was claimed in respect of certain recent sales does not debar pre-emption in the present case. Moreover the period of limitation for pre-emption had not expired when the deputy collector was trying the present case, and it may have been claimed since his judgement was delivered.

I quash the order of the lower court, and order, that if plaintiffs pay Rs. 99 into court within one month, they shall be entitled to pre-empt the land in dispute, and receive their costs in all courts.

If the money is not paid in, their suit will be dismissed with costs in all courts.

Before Mr. P. Wyndham, C.I.E., C.S., Commissioner.

PARJAPATI NAITHANI OF MAUZA KOLA, PATTI KHATSYUN, GARHWAL DISTRICT (APPELLANT) *v.* (1) KIRPAL SINGH, (2) DIWAN SINGH OF DITTO (3) TEJ RAM NAITHANI OF MAUZA JAKH, PATTI KAPHOLSYUN, GARHWAL DISTRICT (RESPONDENTS).

[Special civil appeal no. 79 of 1913.]

Appeal against an order of Mr. J. M. Clay, C.S., Deputy Commissioner, Garhwal, dated the 28th July, 1913.

July 27, 1915.

Pre-emption—Non-ancestral land—Claim by near relative of vendor and co-sharer in the village but non-resident—Proof of custom.

Held that in respect of non-ancestral land a near relative of the vendor (within the third degree) who is a co-sharer in the village but is non-resident therein, has no right of pre-emption against a purchaser who is a resident co-sharer, but not a relative of the vendor. A plaintiff seeking pre-emption on the basis of an alleged custom must prove the existence of that custom.

IN this case Parjapati, plaintiff, was the first cousin of Tej Ram, who sold certain land in mauza Kola, apparently self-acquired (though this point does not appear to have been clearly decided), to Kedar Singh and Diwan Singh, who were also co-sharers in the village.

The plantiff claimed pre-emption as a relative within the third degree, but resided in another village.

The defendants contended that the prior right of a near relative did not extend to non-ancestral land and that a non-resident co-sharer had no right of pre-emption.

The first court decreed the claim on the ground of propinquity of relationship.

The first appellate court reversed this decision holding that a claimant for pre-emption must be a *resident* co-sharer. The Commissioner following a decision of Mr. Campbell's (*Narain Datt* v. *Bhola Datt*) held that a near relative need not be a *resident* co-sharer to be entitled to pre-emption.

On a reference by the Local Government to the High Court that Court returned the opinion reproduced below and the case was remanded to the Kumaun courts for further enquiry on the point of custom and decision and the ruling now cited is the final order in the case.

The case is a Garhwal one and agrees with a ruling of Sir Henry Ramsay's (*Bali* v. *Amlanand*, September 18, 1873) quoted by Mr. Pauw, of which the record is now not forthcoming. In that case Sir Henry Ramsay laid it down that a near relative cannot, as such, claim pre-emption in non-ancestral land.

In other cases (cf. *Gajadhar* v. *Jora and another*, *Lachi Negi* v. *Joga and another*) the question whether the land sold was ancestral or non-ancestral did not arise ; the land was in fact ancestral. In *Narain Datt* v. *Bhola Datt and others* however the exact contrary to the present ruling was laid down by Mr. Campbell in 1913.

Mr. D. R. Sawhny, counsel for Kirpal Singh ; and Mr. *Mr. Lakshmi Narain*, vakil for Parjapati Naithani.

OPINION OF THE HIGH COURT (SIR HENRY RICHARDS, KT., C.J., AND TUDBALL, J.), DATED THE 4TH FEBRUARY, 1915.

This is a reference under rule 17 of the Kumaun rules. It appears that a suit was instituted for pre-emption. It may be taken that plaintiff alleged that there was a custom of pre-emption under which he was entitled to get the property on payment of the consideration. He was a co-sharer in the mahal and he was also a relative of the vendor, but he was non-resident in the village. It may be taken that the defendant pleaded that he also was a co-sharer, that he was resident in the village, and that the property sold was non-ancestral, and that under these circumstances the plaintiff was not entitled to a decree for pre-emption of the property. The courts have found that the plaintiff was a relative and a co-sharer, but that he was a " non-resident." The courts have also found that the defendant was a co-sharer, that he was a "resident " but that he was no relative. They have also found in favour of the plaintiff that the vendor did not before sale offer the property to the plaintiff. The courts framed no issue and did not find whether there was any village custom of pre-emption which affected non-ancestral land, nor have they found whether under such a custom a non-resident co-sharer, who is a relative, has a right of pre-emption against a co-sharer who is a resident, although not a relative. In our opinion it lies upon a plaintiff seeking pre-emption on the basis of an alleged custom to prove existence of the custom and to bring himself within it. In the present case it would rather seem that both sides admitted that there was *some* right of pre-emption existing amongst the co-sharers in the village.

The difference between them was that the vendee said that the custom did not extend to non-ancestral land, and that the plaintiff being non-resident had no right against him, a resident. We think that the court ought to have framed issues upon these two questions and the decision should be in accordance with the findings thereon. The decree of the Commissioner therefore is open to objection under the provisions of section 100, clause *(c)* of the Code of Civil Procedure.

This is our answer to the reference. We think that the costs of both parties should be costs in the case and abide the result.

ORDER BY MR. P. WYNDHAM, COMMISSIONER, DATED THE 27TH JULY, 1915.

This case has been referred to this court for a finding on certain new issues and a decision in accordance therewith.

The petitioner to the Local Government was respondent in this court where it was held that the appellant (the opposite party), though a non-resident, had a right of pre-emption as a relative.

The following additional issues have been framed:—

(1) Is there any village custom of pre-emption which affects non-ancestral lands in this village ?

(2) Under such custom has a non-resident co-sharer, who is a relative, a right of pre-emption against a resident co-sharer who is not a relative ?

These issues were sent to the court of the Deputy Commissioner for an enquiry and finding.

The learned Deputy Commissioner finds—

(1) there is a custom of pre-emption affecting non-ancestral lands in mauza Kola, patti Khatsyun ;

(2) under this custom a non-resident co-sharer, who is a relative, has no right of pre-emption against a resident co-sharer who is not a relative.

I have heard the opposite party against whom these findings operate. I see no reason to differ from the lower court in its findings on this issue.

The result is that the opposite party—the appellant—in this court fails in his appeal which is accordingly dismissed with costs.

Pandit Tara Datt Gairola, vakil for Kirpal Singh ; and Parjapati in person.

RULINGS.

SECTION III.

MISCELLANEOUS.

RULINGS.

SECTION III.

MISCELLANEOUS.

Before Sir Henry Ramsay, Commissioner.

DURGA SINGH AND BHAJAN DATT OF MALLA MARWARA PATTI NADALSYUN, GARHWAL (APPELLANTS) *v.* SALIG RAM BAIRAGI, MANDIR SHANKAR MATH, SRINAGAR, GARHWAL (RESPONDENT).

[Revenue Appeal no. 97].

Temple lands—Alienation by mahant—Incumbrance declared void. *November* 19 880.

Where a mahant recorded as proprietor of certain lands assigned to a temple, mortgaged part of them, it was *held* that the mortgage was void.

SALIG RAM, mahant of the temple of Lachmi Narain Shankar Math, borrowed Rs. 82 on a mortgage of 22½ nalis of *gunth* (revenue-free temple land) in Godi Sera from Durga Singh. It does not appear from the surviving record for what purpose he borrowed the money, nor was the point considered by the courts. Salig Ram as mahant was recorded as proprietor of the land. On a suit for foreclosure it was held by the lower court that the mahant had no power to mortgage or gift or sell *gunth* land; the land could not be held liable for the debt or foreclosed against. If such powers were given, no temple lands would escape. A personal decree was given against Salig Ram for the sum due. The Commissioner's order is somewhat obscure.

TRANSLATION OF ORDER BY SIR H. RAMSAY, COMMISSIONER.

Since mahants appoint *chelas* [who succeed them (?)] this decision of the lower court is correct; hence it is ordered that the appeal be dismissed. Costs (Re. 1-4-0) on the appellant.

Before Mr. H. Ross, Commissioner.

BACHUA LOHAR OF LADHOLI, PATTI DARUN, ALMORA DISTRICT. (APPELLANT) *v.* RAMUA, RATUA AND RATNUA OF DITTO RESPONDENTS.

[Revenue Appeal no. 111 of 1887.]

Padhanchari land—Claim of rights adverse to the padhan. *September* 12, 1887.

Held that in padhanchari land no one can acquire rights adverse to the padhan; each padhan must succeed to it unencumbered, The village headman (padhan or malguzar) in the hills usually holds a certain area of Government land rent (or revenue) free as remuneration or part remuneration for his duties where this area is small he receives cash dues as well.

Claims to proprietary right in such land by adverse possession or by long possession in a padhan's family or to occupancy right by tenants are sometimes raised but never successfully.

In this case defendants were recorded as tenants in this land under plaintiff (who alleged they had dispossessed him) and claimed permanent tenancy rights in it.

A similar ruling, where the heirs of a line of ex-padhans claimed to continue to hold the land was given by Colonel Grigg, Commissioner, in *Nand Lal* v. *Musammat Dhram Sundari and others*, Bhaltgaon, Talla Giwar (not reproduced on the 14th May, 1895.

ORDER BY MR. H. ROSS, COMMISSIONER.

The order of the lower court as regards the second class of land, i.e. the undivided property of the community in it, it was correct to uphold the possession of the respondents. The possession of the respondents should also have been upheld in the third class otherwise trouble is likely to arise.

As regards the padhanchari land, no one can acquire rights in such land adverse to the padhan. The land is Government land given to a padhan for the performance of certain duties and each succeeding padhan must succeed to this land unencumbered when he succeeds to his padhancharship. He can then, if he likes, give it out to tenants for the full period of his padhancharship. At his death and if he is dismissed the rights of these tenants lapse and the new padhan must obtain the land free of any rights by others.

In this case there is no proof that appellant gave the defendants a cultivating lease and made them sirtans, and although long possession no doubt points to some understanding between the parties, still in the absence of any express agreement I think it safer to uphold the padhan. I therefore reverse this part of the order of the lower court and direct that the padhanchari land be made over to the padhan, the appellant. Parties will bear their own costs.

Before the Board of Revenue.

MESSRS. J. J. LUMSDEN AND J. R. REID, MEMBERS.

JASODHAR AND OTHERS OF GHANELI, PATTI TALLA SYUNARA, ALMORA DISTRICT (PETITIONERS) *v.* KAMLI AND OTHERS OF DITTO (OPPOSITE PARTY).

July 13, 1891.

Village common land—Cultivation by majority of shareholders against the will of minority—Inhibitory injunction—Partition.

Where the majority of the shareholders in village common land had commenced cultivating it against the wish of the minority and wished to have partition effected, it was *held* on a suit by the minority that common waste land, so long as it is undivided, cannot be brought under cultivation, except with the consent of all the co-sharers, but that partition can be effected on the application of the majority, who can then obtain separate possession of their shares.

IN this case the village common land *(gaon sanjait)* had been kept waste for pasture. One party of the shareholders had commenced to cultivate it and on objection by the other party (the minority) who sued to restrain them, the former party desired partition.

The minority were held to be entitled to restrain the others from cultivating the land, so long as it remained undivided, but the majority were held to be entitled to claim partition of their shares to enable them to cultivate them when separated.

ORDER BY THE BOARD OF REVENUE.

Messrs. J. J. Lumsden and J. R. Reid, Members.

The wording of the settlement engagement regarding the cultivation of waste land held in common by the khaikars seems to be that when the khaikars desire to cultivate the common land all the shareholders shall divide it by arrangement among themselves *(hamare gaon men jo anbanti zamin hai jab kamana chanenge to apas ke salah se sab hissadar gaon bant lewenge).*

The lower courts have held that the desire of the majority of the shareholders in number and interest is sufficient to give effect to the engagement above quoted. After hearing what the appellant has to say I see no sufficient reason to dissent from the decision of the lower courts as to the principle upon which division of the common land may be applied for and carried out and in respect to it, this appeal is dismissed.

But the agreement does not, in my opinion, authorize even the majority of the shareholders to take any part of the common land and bring it under cultivation without the consent of all the shareholders who have an interest in the land. Shareholders, being supported by a majority who desire to be put in separate possession of part of the common land must, if the whole body of shareholders do not consent to their separate occupation of part of the common land, apply for a partition of the common land to the district authorities.

In so far therefore as the decrees of the lower courts uphold the possession of the respondents upon the land specified in the plaint, from the cultivation of which the plaintiffs sought to restrain the defendants, these decrees are modified, and until a formal partition is effected on the application of the defendants, they cannot be permitted to assume separate possession of any part of the common land.

Each party to this appeal will bear its own costs.

(Sd.) J. R. REID,
Junior Member.

30-6-1891.

I CONCUR.

(Sd.) J. J. LUMSDEN,
Senior Member.

7-7-1891.

ORDERS to issue accordingly.

(Sd.) J. R. REID,
Junior Member.

13-7-1891.

Before Mr. F. Giles, C.S., Officiating Commissioner.

DULAP SINGH, HAR SINGH AND BAGSA SUNAR OF MAUZA YANA (APPELLANTS-DEFENDANTS) *v.* RAM SINGH, JIT SINGH AND LAL SINGH (RESPONDENTS-PLAINTIFFS).

[Revenue Regular Appeal.]

August 31, 1891.

Village common land—Partition—Division equally by families (Mawari Bant).

The custom known as *Mawari Bant* (partition of the common land equally among all families of co-sharers) was enforced in this case on the basis of the village records and of a precedent order of Mr. Becketts.

THE usual principles of apportionment of rights on partition in the village common lands *(gaon sanjait)* in the hills is in proportion to the share of the village land revenue paid by each co-sharer (i.e. *hissa sharah* or *rakam sharah*). In certain villages a peculiar local custom is recorded or alleged known as *Mawari Bant* (from "mao" or "muwasa" a family); by this custom each family among the co-sharers receives an equal share in the common land, whatever their separate proprietary holding may be. The custom is seldom proved, and this ruling is reproduced as an instance of its actual enforcement and of the evidence on which it was allowed. (In villages where it prevails the settlement records show, or should show, the recognized "families" of the village, a point otherwise open to considerable dispute.)

The lower court's (Mr. H. Shaw, Deputy Collector) order is also reproduced as setting out the facts of the case more clearly than that of the Commissioner. It ran as follows:—

The question I am required to decide is whether should *sanjait* land be divided equally according to families, i.e. *mawari*, or whether should it be divided among the co-sharers in the proportion to the revenue they pay. The co-sharers are divided into two parties, the one claim *mawari* and the other *hissa sharah*. Both have produced proof; that adduced by defendants amounts to nothing, it consists of two judgements by Mr. Traill, which have no bearing on the present question, a third by the late Commissioner Sir Henry Ramsay, and that also has no bearing on the present case, and finally a memorandum prepared by the malguzar which is worthless as evidence or authority. The plaintiffs by the *phant* and the *tehriz* and also by a judgement of Mr. Beckett's, all relating to the village in which the land to be divided lies, prove that *Mawari Bant* is the custom of this village.

Decree therefore is given in plaintiff's favour with costs.

ORDER BY MR. F. GILES, COMMISSIONER.

In the present case respondents seek partition of the *sanjait* land. In the case decided by Mr. Beckett the surviving khaikars sought partition of a deceased khaikar's separate holding—the village being held exclusively by khaikars. In principle the holding of a deceased khaikar is on the same footing as common land, all the remaining khaikars having a claim to it. Mr. Beckett divided the holding in suit before him by families and his decision founded on the settlement entries is a direct precedent. The lower court under the circumstances could arrive at no other conclusions than it did.

The appeal must be dismissed with costs.

Before Mr. D. T. Roberts, I.C.S., Commissioner.

DURGA, DEB RAM, AMARI AND SHIBU, OF MAUZA POKHARISAIN (APPELLANTS-DEFENDANTS) *v.* JAI SINGH AND LACHHAM SINGH OF DITTO (RESPONDENTS-DEFENDANTS).

[Revenue Regular Appeal no. 14 of 1891-92.]

August 22, 1892.

Village common land—Disability of co-sharer to create occupancy (khaikari) right in his share—Partition—Inability of tenant to claim partition against proprietors.

A co-sharer in common land cannot create khaikari right in his undivided share of such land; nor can the tenant seeking to enforce such a right claim partition against the joint proprietors.

THE facts of the case appear sufficiently from the judgement. The principles laid down concern both the civil and the revenue courts. They do not declare any local custom in variation of the normal rules of law, but the ruling is included as illustrating local conditions in the hills.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

By registered deed on the 23rd August, 1887, Jit Singh created Jai Singh his khaikar for the area in his *hissa kabza* in Pokharisain and also included his share in the common land. The common land is $66\frac{14}{16}$ nalis and now Jai Singh sues the other co-sharers of the village for separation and possession of his share in this common land as khaikar under Jit Singh.

The land is waste and Jai Singh admits he is not in possession.

A suit of this nature is inadmissible.

A khaikar is a tenant and a khaikari created by deed is not established until possession of the land is given by the hissadar who gives the land.

No co-sharer can create a khaikari right in common land, because the khaikar's right must be in some definite area and not in an unseparated share of waste land. Again, partition can only be demanded by co-sharers and not by tenants in common waste land. Until Jit Singh or his representative has partitioned his share in the common waste his deed conferring khaikari right on Jai Singh is inoperative and Jai Singh cannot maintain a suit for partition against the other co-sharers on the basis of that deed.

The appeal is granted and the suit is dismissed with costs.

Before Mr. D. T. Roberts, I.C.S., Commissioner.

SWARU AND JAI RAM OF MAUZA MASON GARHWAL
(APPELLANTS-DEFENDANTS) *v.* BHAWANU OF
MAUZA MAITANA (RESPONDENT-PLAINTIFF).

[Revenue Regular Appeal no. 79 of 1891-92.]

Village common land — Waiver of right — Loss of share by dispossession. October 7, 1892.

Where a recorded co-sharer in common waste land (measured) allowed the other co-sharers to reclaim and cultivate the whole area and to continue in possession of it for over 12 years without in any way asserting his rights, it was *held* that he had lost all title to his share.

THE measured village common lands *(gaon sanjait)* in the hills are often culturable waste, which has never been broken up or cultivated. In such cases they were not assessed to land revenue at settlement. These had been the conditions in the village in question in this suit. The appellants-defendants had after the previous settlement, about 30 years before, reclaimed and improved the common waste at considerable labour and expense and had held exclusive possession of it for many years. Sur Das, who was blind, had neither contributed towards the reclamation of the land nor ever held or claimed possession of his share. He was the appellants' brother. He gifted most of his property, including his recorded share of the common land, to plaintiff-respondent, his nephew, before his death.

The lower court held that the common land was joint property of all the brothers, that Sur Das could have claimed partition of his recorded share at any time during his lifetime, and that his heir was still entitled to such share; the facts of actual possession were not material to the case. The Commissioner however, in view of the circumstances of the case (which are not uncommon in the hills) reversed the lower courts' order.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

This is a claim to one-fourth of the *sanjait* land, appertaining to the share of Sur Das and is claimed by the respondent as heir of Sur Das under a deed of gift.

The defendants object that Sur Das was never in possession of this *sanjait* land, that they alone brought it under cultivation and have been in possession of it. The entry of land as common does not necessarily imply that each sharer in the village has an equal right to a proportional share in it under all circumstances. Each sharer has a right to break up and bring under cultivation his share of the common land, but it does not follow that if he waives that right and allows the other sharers to cultivate the land he can at any time reclaim his share, and specially is this the case in unassessed land.

In the present case Sur Das has expressly been found by the lower court to have never been in possession of any portion of the *sanjait* land, and this means dispossession for more than 12 years. I therefore hold that his successor cannot now claim to dispossess the other sharers who have broken up the land and have always been in cultivating possession.

I therefore grant the appeal and dismiss the plaintiff's suit with costs.

Before Mr. D. T. Roberts, I.C.S., Commissioner.

GUMAN SINGH OF MAUZA MAUNDARI MAUNDARSYUN (PLAINTIFF-APPELLANT) *v.* KHUSHAL SINGH, THOKDAR OF DITTO (DEFENDANT-RESPONDENT.)

[Special Civil Appeal no. 7 of 1893.]

Appeal against an order of Mr. W. R. Partridge, C.S., Deputy Commissioner, Garhwal, dated the 17th March, 1893.

Thokdari dues—Claim to enforce lien on such dues in civil courts.

May 18, 1893.

An obligation against a thokdar secured by a deed on his dues of office cannot be enforced by suit against his heir and successor in office.

THOKDARS in the hills are more or less prominent land owners, who hold a practically nominal position as police officers, they receive as remuneration certain dues on the revenue of the villages over which they are thokdars.

The parties in this case were of the same family, the defendant thokdar being said to be of an illegitimate line and defendant's father had bound himself many years before by a deed to hand over half his dues to the plaintiff's father, apparently in consideration of a loan.

Sir Henry Ramsay had upheld the deed by a decision in 1863, but had then laid down the rule that the agreement could not bind the thokdar's successors. This decision was enforced by the order now referred to.

The first appellate court's order was as follows:—

Defendant-respondent may or may not be bound in honour to go on paying to plaintiff-appellant half the thokdari dues or repay him the Rs. 331.

This is a point I have not to decide. But I am clearly of opinion that plaintiff-appellant cannot in the face of Commissioner's order, dated the 29th August, 1863, enforce by process of law his claim to half such dues. Appeal dismissed with costs.

ORDER BY MR. D. T. ROBERTS, COMMISSIONER.

The order of the lower court is undoubtedly correct and there is no ground for admitting a special appeal. Rejected.

Before Colonel G. E. Erskine, Commissioner

PADAM GIR OF MAUZA BAGTOLA (SPECIAL APPELLANT-DEFENDANT)
v. (1) DULANATH AND (2) LUCHANATH (SPECIAL
RESPONDENTS-PLAINTIFFS).

[Special Civil Appeal no. 17 of 1893.]

Appeal against an order of Mr. F. Giles, C. S., Deputy Commissioner, Almora, dated the 28th July, 1893.

December 4, 1893.

Temple lands—Service tenure—Sale to person incompetent to perform service.

In a village held revenue-free as a temple endowment the priests were recorded as co-sharers in consideration of their services at the temple. Where one of them sold part of his land to an outsider who was not qualified to perform the temple service, it was *held* that the sale was a perversion of temple endowments and was liable to cancellation on the suit of the *pir*, or chief priest, or of any worshipper.

THE facts of the case appear sufficiently from the order of the first appellate court, which is reproduced in full. *Gunth* villages in the hills are villages held revenue-free as endowment of a temple.

The Deputy Commissioner's order was as follows :—

On the 10th December, 1892, Luchanath, one of the *pujaris* of the Nagnath temple, who, in consideration of performing *puja* at the temple, holds a share in the *gunth* mahal of Binkholi, sold 62 nalis in that mahal to Padam Gir, appellant.

On the 23rd February, 1893, Dulanath as *pir* or *sirgiroh* of the temple, sued for the cancellation of the deed of sale.

It is clear from the Settlement *hukmnama* of the 19th December, 1872, that the sharers in Binkholi hold in consideration of service at the temple.

It would also appear from the *razinama* of the 24th February, 1877, filed in the suit that Jamana Nath was made *pir* of the temple. Dulanath succeeded Jamana Nath. The appellant admits that he is not competent to perform the temple services, but he says other sales have taken place to outsiders. If they have, the *pir*, for the time being, neglected his duty in not contesting them.

Such neglect can give appellant no right to the wrong that would be done to the temple by transfer to him. Appellant further urges that Dulanath is not the *pir* and is not entitled to sue. The papers filed in the record seem to show that Dulanath is *pir*, but if he were not, any worshipper might bring into court a case of perversion of the temple endowment.

Lastly, appellant says he has spent money in building ; if he has, his remedy is against Luchanath, the vendor, who had no right to sell.

Appeal is dismissed with costs.

ORDER BY COLONEL G. E. ERSKINE, COMMISSIONER.

I refuse to admit a special appeal. The concurrent orders of the lower courts are perfectly right.

Before Colonel E. Grigg, Officiating Commissioner.

KUNA SAH MAKHALIA OF BAGESAR KATYOOR (APPELLANT-DEFENDANT)
v. PREMUA RAWAL OF DITTO (RESPONDENT-PLAINTIFF).
[Civil Appeal no. 3 of 1894.]

Appeal against an order of Mr. E. K. Pauw, C.S., Assistant Commissioner, Almora, dated the 5th December, 1893.

Temple lands—Sale by person holding proprietary right on a service tenure.

July 21, 1894.

In a village assigned to the Hitpanteswar temple, Birua, a priest of the temple, was recorded as proprietor of certain land in his capacity as priest, i.e.

on a service tenure. He sold this to Kuna Sah, a bania. On a suit by Premua, the son of Birua, who was also a priest, it was *held* that a recorded co-sharer in a muafi village is entitled to do what he likes with his share; the custodians of the temple can sue for the income *(sic!)*.

In villages assigned to temples (*gunth* lands) the temple stands in the place of Government, and the land is held either *(a)* by priests or other functionaries who render service to the temple in lieu of payment or *(b)* by cultivators who pay the revenue or other dues to the temple; in either case the landholder is commonly recorded as a proprietor (hissadar).

There are various rulings regarding the power or disability of the recorded proprietor to alienate such lands, and it has generally been held that land held on a service tenure cannot be alienated.

In this case Birua was a *rawal*, or hereditary priest of the Hitpanteswar temple, and as such he held *gunth* land on a service tenure. He mortgaged this to Kuna Sah who subsequently sued for foreclosure and obtained a simple money decree. He got the land attached and then arranged a private sale with Birua.

Premua, the son, sued to set aside the sale on the ground of the inalienability of the tenure. It appears from the lower court's order that he was already a priest himself and he sued in that capacity, but did not raise any plea of his rights as a son. The lower court following previous rulings (cf. *Padamgir* v. *Dulanath and another*) decreed the suit, but the Commissioner, ruling as above, dismissed it.

The ruling is reproduced not on its merits as a ruling but *(a)* because it *is* a ruling and has been quoted as such to support sales of *gunth* lands held on service tenures and *(b)* to show from its wording that it is really irrelevant to the question of the alienation of service tenures, and to illustrate the mistakes into which courts inexperienced in local conditions are apt to fall.

It is quite clear from the wording of the Commissioner's order that he supposed the tenure to be one simply paying revenue or dues to the temple, and ignored or failed to apprehend the fact that the landholder paid nothing at all but held the land as remuneration for serving as a priest.

The judgement itself shows that it cannot be quoted as laying down the principle that a priest holding temple land on a service tenure can alienate it to a person incapable of performing such service. (See Commentary.)

Pandit Hari Ram for appellant.

ORDER BY COLONEL E. GRIGG, COMMISSIONER.

The only question to decide is, whether the vendor Birua can sell his recorded share in this land. Birua is the father of Premua, respondent. The power to sell was virtually fought out in the execution of decree case.

The *Fard Tasdiki* shows the seller is a recorded sharer in this muafi village, and is therefore entitled to do what he likes with his share.

There is no doubt, I think, that the income from the lands goes or is intended to go to the support of the temple. If this is so, and of this there is no absolute documentary proof, then the custodians of the temple are at liberty to sue for the income.

I accept this appeal and, reversing the order of the lower court, dismiss the claim with costs.

Revisional order by the Local Government.

AMBA DATT JOSHI AND BACHI SINGH BHANDARI (DEFENDANTS-RESPONDENTS) *v.* DAULAT SINGH BHANDARI OF MAUZA MELDUNGRI (PLAINTIFF-APPELLANT).

[North-Western Provinces High Court's Miscellaneous no. 128 of 1895.]

March 6, 1896.

Temple lands (gunth)—*Service tenure—Gift by recorded co-sharer—Alleged perversion of endowment—Capacity to alienate.*

In the village of Meldungri, which was assigned to the Brahmari temple, defendant Bachi Singh was recorded as a co-sharer. He gifted half his share to one Amba Datt. Plaintiff alleged that the land was held on condition of making offerings and performing certain services for the temple, and that the donor's title was not transferable; the object of the endowment would be defeated, if alienations were permitted. After an inquiry into the tenure and customs it was *held* that such holders of temple lands could by custom alienate their rights. It was not proved that the conditions of the endowment would be broken by the transfer.

THE outline of the facts appears from the headnote above. In temple villages of the class in question the temple stands in the place of Government and the villagers are recorded as proprietary co-sharers; in some of these villages they pay the assigned revenue assessment or other dues to the temple, and in others they hold on a service tenure, performing certain services for the temple in lieu of a money payment. In this case it appears that the donor held his land on condition of making certain offerings and performing certain services for the temple. It was contended that these services included certain menial acts which a Brahman, such as Amba Datt, donee, could not perform. The lower court however found that a Brahman would not be disqualified from performing these services. That court however felt itself bound by previous rulings [cf. *Dulanath* v. *Padamgir* (q, v.)] to hold that *gunth* lands held on service tenure could not be alienated; it found however that other co-sharers in these *gunth* villages had customarily alienated their lands.

The Commissioner, Colonel Grigg, held that there was nothing to show that the income of the land would not be devoted to the temple as heretofore or that the transferee would not perform the services required or that the temple would suffer in any way; a sharer in a muafi village could by custom dispose of his rights (see his order reproduced below). He therefore upheld the transfer and dismissed the suit. On a reference by the Local Government to the High Court a remand enquiry was ordered into the facts of the case on certain issues. The report of Colonel Grigg on these issues is reproduced below, and the High Court on this gave their opinion in favour of dismissing the suit; the Local Government passed orders accordingly.

From a study of this ruling it will be seen that the principles laid down do not conflict with those of earlier rulings in any material degree. It is only ruled that co-sharers on a service tenure in *gunth* lands can alienate their rights, *where* such alienation will not interfere with the service to be performed for the temple or where the object of the endowment will not be defeated by the transfer. It is clear that the principles of the decision would not apply to uphold a transfer by a Brahman priest, holding on condition of priestly service, to an outcaste who could not approach the temple at all. This would involve a perversion of the endowment and of the conditions of the tenure, and would be clearly distinguishable from the present case.

The following were the various orders passed in the case :—

Order by Colonel Grigg, dated July 10, 1894.

Remand report by Colonel Grigg, dated November 9, 1895.

Reply by the High Court, dated February 6, 1896.

Order of the Local Government, dated March 6, 1896.

ORDER BY COLONEL E. E. GRIGG, COMMISSIONER, DATED THE 10TH JULY, 1894.

The land has not been alienated from the purpose for which it was granted. There are certain recorded sharers in the *phant* or malguzar's record. One of them is Bachi, who has gifted half of his recorded share to Amba Datt. Plaintiff, who is a co-sharer, objects to this transfer. The muafi grant of this village to the co-sharers is not on the file.

The record at the foot of the *phant* is: "the entire village is the *gunth* of the Brahmari temple;" from this it would seem that the land was granted to the co-sharers for the service of this temple. There is nothing to show that the income arising from these lands will not be devoted to the temple as heretofore or that the person to whom the land is gifted will not perform the services required, or that the temple will suffer in any way by this gift.

It has always been held that a sharer in a muafi village can dispose of his rights. It remains for the custodians of the temple to show that any of the conditions attaching to the *sanad* will be broken by this transfer. No attempt has been made to prove or show this. I accordingly accept this appeal and, reversing the order of the lower court, dismiss the claim with costs of both courts.

REMAND REPORT BY COLONEL E. E. GRIGG, COMMISSIONER, DATED THE 9TH NOVEMBER, 1895.

Pandit Hari Ram, vakil, for plaintiff; and *Pandit Badri Datt* for respondent.

The evidence bearing on the issues framed by the High Court of the North-Western Provinces has been recorded by Mr. Larkin, Deputy Collector. To-day the pleaders of the parties appeared before me to argue the case.

With reference to the first issue. What is the nature of the endowment? The learned counsel for the plaintiff refers to the *wajib-ul-arz* or record-of-rights prepared in 1872.

This document was apparently drawn up by Mr. Beckett, the Settlement Officer, in consultation with the persons claiming rights in this village and is attested by him on the 15th December, 1872. A translation of this document is appended. It is marked W in blue pencil.

The plaintiff's counsel lays great stress on the word "*kabzadar*" used by the Settlement Officer, and urges that the persons who were classed as such were merely holding the land for the service of the temple.

It is needless to point out that the term "*kabzadar*" has reference solely to persons being in possession. It is not to be construed as meaning the *kabzadar* of the North-Western Provinces. The village had been waste, but when the muafi lists were prepared in 1859, I think, the cultivated area, or at any rate the area which was assigned for the purposes of the temple of Nanda Devi, or rather the goddess bearing that name, was found to be $76\frac{9}{10}$ "bisis." This area at the survey of 1872 was found to be 107 "bisis." The land was being brought under cultivation and the Settlement Officer determined, for the purpose of assessing certain cesses (patwari, road, school, etc.) to fix a certain revenue. This for the above purposes was fixed at Rs. 60. An Singh was recorded the malguzar. The Settlement Officer goes on to say: "The shares are partitioned. There are no khaikars (i.e. occupancy holders corresponding somewhat to the term *kabzadar* in the North-Western Provinces). *Phant*, i.e. the *khewat* may be prepared by nalis (a measure of land $\frac{1}{16}$th of a bisi*) an application may be taken."

It is difficult to understand the object the plaintiff's counsel had in dwelling on the expression "*kabzadar*" when it turns out there were no "khaikars."

---

* A nali is $\frac{1}{20}$th of a bisi and not $\frac{1}{16}$th.

The reply to the first issue is, the nature of the endowment revenue-free land assigned to a temple and recorded as being in the proprietary possession of certain persons among whom at the present time are plaintiff Daulat Singh and Bachi Singh.

The second issue is, what is the nature of the plaintiff's title to the land in his occupation? Has he a proprietary right, or is he merely a tenant or licensee of the mahant of the temple?

The plaintiff's counsel says there is no mahant of the temple, i.e., there is no recognized or established mahant, but he claims for his client that the latter does these duties. This is denied by the defendants who urge that Ganga Datt performs the office of *pujari* when his services are required, and for this office a certain village has been assigned to him, and although Daulat asserts he collects the offerings, this is stoutly denied by Shib Singh, who is now the malguzar of the village. The evidence goes clean against Daulat Singh's contentions, and moreover, it is very unlikely the malguzar or lambardar would for a moment allow Daulat Singh to exercise an office which had been assigned to him (Shib Singh) by the district authorities. Plaintiff's title is set forth in the *khewat*. He is a proprietor pure and simple and not a tenant or lessee of the mahant.

3. What is the nature of the title of the donor? Was his right proprietary? Was he a tenant or licensee of the mahant of the temple?

Here again the *khewat* is the answer. The donor is a recorded sharer or proprietor. But plaintiff says . . I am in possession of the land which he (defendant) would gift—and this claim is the real cause for this suit . . . It is claimed for defendant, he *is* in possession and the malguzar supports defendant. The mere fact that defendant resides like many other proprietors of these hills in another village cannot annul his recorded right. The question of possession will, I have no doubt, be fought out sooner or later when this reference is decided.

But this claim refers to issue 4. Has the plaintiff any, and what, interest in the lands—the subject of the gift—and has he any, and, if so, what right to maintain a suit for the cancellation of the gift?

Beyond the bare statement to support which plaintiff has now produced two witnesses that he is in possession of the land, there is no proof. This claim is denied by the other side and supported by the evidence of the malguzar. The defendant is the recorded proprietor of the share he has gifted and the plaintiff has no recorded title to oppose the defendant's claim. As regards his right to maintain this suit he has none, so far as I can see, and this, I think, is self-evident from what has been admitted by him in connection with issue 5. Is there any general usage in the district or particular usage in the village allowing or prohibiting an alienation of lands of this description ?

Not only does the plaintiff admit having *sold* certain lands to a man called *Kunwar*, who is said to be his father-in-law, but the evidence shows there have been other alienations, and, moreover, in his finding Mr. Pauw points out that of the 11 villages which have been assigned to the Bhamari Devi five have merely the bands assigned, i.e. there is no revenue assessed on them. Meldhung is one of the latter. Of these five in no less than four have shares been either sold or gifted. He proved in fact that the custom of transfer did exist and was only deterred from dismissing the claim by the order of Sir Henry Ramsay passed in 1890 in respect to *gunth* land.

The defendant's counsel is ready to file other documents in support of transfer of such lands, but there appears no necessity for this.

Plaintiff's own action in selling some of the lands recorded in his name would appear an absolute bar to his setting up this claim.

REPLY BY THE HIGH COURT.

Edge, C. J., and Banerji, J.—On the findings on remand we are of opinion that the plaintiff's suit should be dismissed with costs. This reply will be submitted to His Honour the Lieutenant-Governor and Chief Commissioner.

ORDER BY THE LOCAL GOVERNMENT.

G. O. no. 345/*VII*—11-*B.*-517, *dated the* 6*th March,* 1896, *to the Commissioner, Kumaun division.*

I AM directed to return the records of the case of *Amba Datt* v. *Daulat Singh* received with your letter no. 783/XIV—2, dated the 14th November, 1895, together with a copy of the High Court's final report in the case; and tho say that, in the exercise of the power vested in him by section 17 of the Kumaun Rules, His Honour the Lieutenant-Governor and Chief Commissioner is pleased, in accordance with that report, to direct that the plaintiff's suit be dismissed with costs in all courts.

Before Mr. J. S. O. Davis, I.C.S., Commissioner.

JAIKISHEN, INDRA DEV LACHMI DUTT AND LILADHAR JOSHI OF DANIA (MORTGAGORS) (APPELLANTS) *v.* KIRPAL DATT PANT OF DITTO, (MORTGAGEE) (RESPONDENT).

[Settlement Appeal no. 23 of 1902-03.]

Second appeal against an order of Mr. J. E. Goudge, C. S., Settlement Officer, Almora, dated the 14th November, 1912.

February 3, 1903.

Unmeasured land—Extension of cultivation by possessory mortgagee—Resultant title.

Where a possessory mortgagee, being himself also a co-sharer in the village, extended his cultivation of the mortgaged land into adjoining Government waste, *held* that he was entitled to proprietary right in such extensions against the mortgagors.

THE facts of the case are that the respondent held a usufructuary mortgage of appellants' separately held land in Dania village. By customary right in the hills a co-sharer is allowed to extend his cultivation into adjoining unmeasured (Government) waste subject to executive regulation, and is given proprietary right over such extensions at the next settlement.

In this case the respondent made extensions of cultivation in waste land adjoining that held by him on mortgage. At settlement it was claimed by the mortgagors that these extensions should be considered as appertaining to their holding and should be recorded as their proprietary land with the mortgages as a tenant. The Settlement Officer disagreeing with the Settlement Deputy Collector rejected their claim. The mortgagee was himself a co-sharer in the village.

[NOTE.—Questions relating to extensions of cultivation in unmeasured land are being reserved to the revenue courts, but under the rules regulating procedure where such questions arise in a civil suit, similar points may arise in civil suits on mortgages: hence this ruling is included for reference.]

ORDER BY MR. J. S. C. DAVIS, COMMISSIONER.

Appellants were heard on the 13th January. The principal point is whether extensions of cultivation made by possessory mortgagees should belong to them or to the mortgagors. I think there can be no doubt that the decision of the Settlement Officer, whereby such extensions are recorded in the name of the mortgagee, is correct.

The appellants (mortgagors) can only acquire rights in unmeasured land by cultivating it themselves or through their sirtan tenants. The respondent (mortgagee) being a hissadar in his own right in addition to being mortgagee of the appellant's share is fully entitled to extend his cultivation of the mortgaged share and to have such extension recorded in his own name.

The appeal is dismissed with costs.

Before Mr. A. M. W. Shakespear, C.S., Commissioner.

RAWAL GANESH LING OF KEDARNATH TEMPLE (APPELLANT) v. THE PANDAS OF KEDARNATH (RESPONDENTS)

[Special Civil Appeal no. 17 of 1905.]

Appeal against an order of Mr. V. A. Stowell, C.S., Deputy Commissioner, Garhwal, dated the 17th July, 1905.

Claim.—To set aside the decree declaring respondent-plaintiffs, right to enter the temple of Kedarnath as pandas with their *jajmans* and to receive and retain gifts made to them by way of *shankalap*, whether delivery be made inside or outside the temple.

December 11, 1905.

Kedarnath temple—Right of pandas to enter temple—Right to sue—Distinction between gifts and offerings—Right of pandas to retain gifts.

Where the *rawal* of Kedarnath had obtained an order of the District Magistrate prohibiting the pandas (the personal priests of the pilgrims) from entering the temple with their clients, and further claimed the right to all gifts made within the temple to the pandas, it was held that the *rawal* had no right to deny excess to the temple to the pandas, and that the latter were entitled to receive within the temple and retain all gifts made to them by their clients and intended as gifts to them and not as offerings for the temple. The exercise of these rights must be subject to the power of the *rawal* to maintain order and decency in the temple.

THIS was a suit by the body of pandas attached to the Kedarnath temple. These men, a corporation of nominally "eight *sayanas* (or headmen) and eighteen scores of pandas" are the hereditary personal priests or guides who accompany pilgrims to the temple and conduct them through the necessary ceremonies and to the various sacred places at and near Kedarnath.

In 1904 the *rawal* (chief priest), on the pretext of avoiding overcrowding and disturbances in the temple, had obtained an order from the District Magistrate forbidding the pandas from entering the temple with their clients; he also denied their right to accept and retain gifts made to them within the temple and claimed for the temple everything given by a pilgrim within its precincts.

The pandas sued to establish their rights in these two matters.

It was contended for the defendant that the plaintiffs had no right to sue as a body and no status in connection with the temple.

The ruling involves several important points of general principle and the case concerns a large body of persons in Garhwal.

The order of the lower appellate court, which discusses the case in greater detail, is reproduced. A similar ruling (not reproduced) relating to the right to receive and retain gifts at Guptkashi was given in *Rawal Ganesh Ling* v. *The Pandas of Kedarnath* (S. C. A. 17 of 1905) by Mr. Shakespear, Commissioner.

ORDER BY MR. V. A. STOWELL, DEPUTY COMMISSIONER OF GARHWAL, DATED THE 17TH JULY, 1905.

I shall deal with this case and the cross-appeal no. 40 jointly in this judgement. The lower court has gone into the facts and circumstances of the case at great length and I shall merely consider the four or five points which now require decision, without setting forth the past history of the relation between the parties and the religious ceremonies involved in the performance of a pilgrimage. The first point raised is whether the suit can lie under section 11, Code of Civil Procedure.

The defendant quoted the finding of the Commissioner in the Badrinath case of 1895-96 in support of his contention that the suit is not maintainable. This case however is not on all-fours with that case. The plaintiffs in this case have, and always have had, an undoubted, though ill-defined, office in connection with the temple of Kedarnath and their suit relates to that office and their emoluments. The present suit is precisely similar to *Kali Das Jiv Ram and others* v. *Gor Parjaram Hirji and others* (Bombay, no. XV, page 309), both in its nature and circumstances. I consider there can be no doubt as to its maintainability.

The defendant's next objection relates to the amendment of the plaint, whereby an addition to the relief claimed was made. The lower court has rightly allowed this amendment since " an alteration in the relief claimed does not alter the character of the suit (vide Calcutta XX remarks on page 808). We now come to the two substantive issues, whether the plaintiff pandas are entitled to accompany the pilgrims (their *jajmans*) into the temple and pilot them through the ceremonies performed therein, and whether they are entitled to receive and retain gifts from their clients whilst within the temple.

It may be noted that in this suit we have nothing to do with the executive and administrative control of the temple and the persons entering it. It is no answer to the claim to say that allowing the plaintiffs to enter with their *jajmans* would tend to cause confusion and crowding in the temple. The orderly arrangement and marshalling of persons entering the temple is a separate question of executive control, and if a crowd of pilgrims with a number of pandas tried to enter the temple at once the *rawal* could rightly check them and admit them in successive parties. It is clear however that there is ample room for all pilgrims and pandas also to enter the temple in their due turns; the long and difficult journey from the plains precludes any possibility of crowding in the sense that more pilgrims visit the temple in a day than could be admitted conveniently. (As a matter of fact in the height of the season only some 300 or 400 a day pass up the pilgrim route.)

What we are concerned with however at present in this civil suit is the hereditary right of the pandas, as office holders of a sort of the Kedarnath temple, to accompany their *jajmans* into the temple. Now it is clear that they, like everyone else who is not ceremonially unclean, have a perfect right to enter the temple; it also appears beyond doubt that they do accompany, and always have accompanied in their capacity as pandas, their clients in their ceremonial visit to the temple. Provided they behave themselves in a seemly and orderly manner and submit to necessary regulations for the convenience of the temple administration, I consider that they cannot be interfered with. The *rawal's* control extends to the appointment and dismissal of the temple staff, the receipt and expenditure of the temple revenues, the ordering of the temple services and the enforcement of order and of proper and peaceable behaviour within the temple; he could exclude an outsider who entered the temple for improper purposes or in any way disturbed the services or the worshippers, but I consider he has no right to prohibit altogether the attendance in the temple on their *jajmans* of the pandas who are a recognized body of spiritual advisers and guides, attached to the temple from time immemorial.

Turning now to the question of *dan dukshina* (the gifts made by the pious to their attendant pandas). The lower court has, it seems to me, fallen into some confusion (which the defendant naturally seeks to increase) through a failure to clearly distinguish between a *gift* and an *offering*. The pandas used, it appears, in former times to be entitled to a share of the actual offerings made to the god. This right they have lost and no longer claim. But there is all the difference in the world between an offering and a gift. All offerings must undoubtedly go to the temple and the *rawal* as its manager has a right to everything that is intended to be given *as an offering* to the god or gods of the temple. But a gift is the property of the person to whom it is given and to whom the giver intends that it shall belong, and this is the case wherever delivery of the gift may be made. There are various orders on record precluding the pandas from taking or receiving anything that is offered in the temple; there is no order laying down that a gift made by a pilgrim *to a panda* and intended as a gift to the panda may be appropriated by the temple. It is against law and commonsense that there should be any such ruling. The intention of the giver is and must be prepotent in such a matter, and if he intends the gift to go to the panda as a reward for his services or as a pious expression of his gratitude to Brahmans, or for the purpose of inducing the panda to perform certain ceremonies for him in the future, then the panda is entitled to retain that gift. Whether the shrine is a suitable place for the delivery of gifts is quite another question and one appertaining to the administrative control of the temple. If a pilgrim carried with him a load of articles and proceeded to open and hand them over in the shrine, or if the pandas created a disturbance by demanding the delivery of a gift in the shrine, they could very properly be turned out and such practices put a stop to. But if a pilgrim having vowed a *shankalap* in the shrine proceeds to slip a gold mohur or a few rupees into his panda's hand in fulfilment of his vow, it is absurd to say that the gift must go to the temple or that the panda is prohibited from retaining it. I therefore accept the plaintiff-appellant's appeal and modify the order of the lower court by amending paragraph *(a)* of the order and decree as follows :—

> " *(a)* To enter the temple of Kedarnath as pandas with their *jajmans* and to receive and retain gifts from their *jajmans* when made to them by way of *shankalap* and intended for the personal benefit of the panda, whether delivery be made inside or outside the temple. This right is subject to the administrative control of the *rawal* so far as the maintenance of order and decency and the enforcement of proper behaviour within the temple are concerned."

Costs in the lower court and of this appeal will be paid by the defendant-respondent.

ORDER BY MR. A. M. W. SHAKESPEAR, COMMISSIONER.

This is a special civil appeal. The case refers to a dispute between the pandas and the *rawal* of the Kedarnath temple. It is argued in this court that the suit does not lie in the civil court. On this point there is a precedent in the case *Kalidas Jivram* v. *Gor Pargaram Hijri* (Bombay, XV, page 309). In that case the Gors sued the *shewak* of the temple, being aggrieved by an order of the *shewak* that admission to the temple should be by ticket. It was held that the order was *ultra vires* and gave a cause of action. In this case we find the *rawal* of Kedarnath got the Deputy Commissioner of Garhwal to pass an order to the effect that the pandas were not to enter the temple with pilgrims. A very clear cause of action then arises and I find the suit lies.

As regards the facts it is clear that the pandas have from time immemorial entered the temple with their patrons (the pilgrims). The contention of the *rawal* that the pandas cannot enter the temple is undoubtedly wrong. The lower appellate court has granted a decree declaring that the pandas are entitled to enter the temple.

A further question arose as to the right of the pandas to receive gifts from their patrons.

It is necessary to consider the meaning of *charhawa*. This word means an offering to a deity. In old times it is clear that the pandas received half of such offerings. For years that right has been lost and the pandas do not now claim this. They claim however to receive and retain free gifts given to them as *dan dakshina*. They have clearly the right to such gifts. The decree of the lower appellate court is therefore correct.

The decree has carefully laid down that " this right is subject to the control of the *rawal* so far as the maintenance of order and decency and the enforcement of proper behaviour within the temple are concerned."

I am of opinion that the wording of the decree is proper and I dismiss the appeal with costs.

Pandit Jwala Datt Joshi, vakil, and *Pandit Mathura Datt Pande*, vakil for appellant ; and *Mr. Bomanji* and *Mr. Talati*, Barristers-at-Law and *Pandit Tara Datt Gairola*, vakil, for respondents.

Before Mr. E. F. L. Winter, C.S., Commissioner.

BAGA, JOTU, GUMANU, NAINU, GHIAYALIA through KIRPAL SINGH, younger brother of BAGA, residents of mauza Thalda, patti Langurpalla, Garhwal district (Appellants-Defendants) *v.* RAM SINGH, LAL SINGH, UDE SINGH, RAM SINGH RAWAT, of mauza Bhayasu, ditto (Respondents-Plaintiffs).

[Special Appeal no. 5 of 1908.]

Appeal against an order of Mr. V. A. Stowell, C.S., Deputy Commissioner, Garhwal, dated the 7th December, 1908.

Rights in water—Irrigation channels—Local custom of prior user.

March 22, 1909.

Held that the local custom regarding the utilization of water in the hills depends on the question of prior user. No man may divert or take the water of a stream, if by so doing he interferes with the pre-existing utilization of such water by another man. Water in the hills is the property of Government and its utilization is a matter of public policy.

THIS case relates to the utilization of the water of a hill stream for irrigation purposes by the construction of a channel (*gul*) to lead the water by gravitation on to the fields. All streams in the hills and their beds are "unmeasured" and are recognized as the property of the State; and the law of riparian proprietorship in force elsewhere has no application to the conditions in the hills. This ruling lays down the custom clearly and refers to various earlier rulings where the same principle was followed.

As this is the latest and most comprehensive ruling on the subject, and the principle has never been dissented from, I have not thought it necessary to reproduce any other rulings on the subject.

Babu Din Dayal, vakil for appellants; and *Pandit Tara Datt Gairola* for respondents.

ORDER BY MR. E. F. L. WINTER, COMMISSIONER.

In this case the plaintiffs are the proprietors of a *gul* constructed some eight years ago for irrigation purposes. The defendants-appellants recently constructed a *gul* higher up the stream. The plaintiffs urged that this interfered with the supply of water to their *gul* and sued to have it closed. The court of first appeal has found that except during the rains the defendants' *gul* cannot be used except to the detriment of the plaintiffs and has given the plaintiffs a decree stopping the use of the defendants' *gul* from the end of *Katik* till the 15th *Asarh* and during the rains for all but two days in the week.

An appeal is filed by the defendants on the ground that every villager on the banks of a natural stream has a right to the use of the water in a stream, and that plaintiffs by the use of the water for eight years only had acquired no easement depriving defendants of their natural right.

The court of first appeal has found that streams in the hills are the property of Government and part of the waste and unmeasured land which is Government protected forest, and that, in accordance with the custom in Kumaun, the question as to the right of water is one of prior right, and that any man may take water for irrigation purposes, provided he does not interfere with any pre-existing right or utilization of the water. Once he has done so, no other man or village can claim to take the water so as to interfere with the first man's supply.

I entirely concur in this view ; it is that consistently followed by this court. I have been referred to and can find no decisions opposed to it. On the other hand there are numerous decisions based on it. I refer to a few.

In the case of *Ganga and others* v. *Tula Ram,* Mr. Ross, Commissioner, recorded in 1885 : " It seems quite clear that the Mandal Sera people have been first in the field and had this *gul* made long before the Phultania people. There is not enough water for the Mandal and Phultania people and so only Mandal Sera can be supplied."

In the case of *Ahmad Husain* v. *Mohi-ud-din,* Mr. Ross, Commissioner, recorded in 1885 : " Appellant cannot urge anything regarding the distribution of the water, because it is the property of Government and Government can utilize it in the manner it thinks best for the State."

In the case of *Kedaru* v. *Hari Ram etc.*, Mr. Hamblin in 1898 held that the right to extend irrigation from an existing *gul* depended on whether this would interfere with the irrigation by other persons at the time existing.

I have myself decided several cases on this principle. It must be remembered in explanation of this custom also that irrigation from most of these streams is only possible by the construction of a *gul* at some expense.

It would obviously be unfair and opposed to equity and public policy if when a man has incurred expense in constructing a *gul* to utilise water up to that time running to waste, another man higher up were to be allowed to make that *gul* useless by intercepting all the water.

When a *gul* has been constructed and is in use the villagers higher up are only entitled to divert so much of the water as can be taken without detriment to the area up to that time irrigated by the already existing *gul*.

This is the custom as I find it existing in Kumaun, and I dismiss the appeal with costs.

NORTH-WESTERN PROVINCES HIGH COURT.

REVISIONAL JURISDICTION.

Before Justice Sir P. C. Banerji and Mr. Justice Muhammad Rafique.

MUSAMMAT SARDA AND ANOTHER OF DEOPRAYAG (PETITIONER)

v. LAJJA RAM AND OTHERS (OPPOSITE PARTY).

[Miscellaneous case no. 224 of 1915.]

March 23, 1916.

Priestly rights of pandas—Gift of right by widow of deceased priest—Suit by body of priests as reversioners—Claim to monopoly of offerings— Res judicata—*Foreign court.*

A body of priests, the Deoprayagi pandas of Badrinath, receive offerings at the Taptkund pool. On the death of one of them without male heirs his widow executed a deed of gift of his priestly rights in favour of her husband's sister's sons; the sister had married a man of a different caste and not one of the pandas. The plaintiffs sued as the "panch pandas" of Badrinath for cancellation of the deed and for an injunction restraining the donees from acting as pandas at Taptkund, on the ground that they (plaintiffs) were reversioners to the estate of the deceased panda, that the rights of a deceased panda who leaves no heir devolve on the panch pandas, and that the body of pandas alone have the right to receive offerings from the pilgrims at Taptkund.

It was *held* by the High Court that the plaintiffs had failed to prove their alleged reversionary rights, direct or remote, and had also failed to establish their sole right as panch pandas to the receipt of offerings at Taptkund.

It was further *held* by the Commissioner that a decision of the Tehri courts, in a connected case between the same parties, did not constitute the present case *res judicata*.

THE facts of the case appear sufficiently from the judgement of the Commissioner (Mr. Wyndham) whose order is reproduced below. Two misapprehensions of the circumstances of the case, which appear in the High Court's reply, may be corrected here. Deoprayag is a town at the junction of the Alaknanda and Bhagirathi rivers, which here unite and form the Ganges; it is not a temple. Badrinath and Taptkund are not "at a short distance" from Deoprayag, but well over a hundred miles away.

The opinion of the High Court was accepted by Government and the plaintiff's suit dismissed with costs (G. O. no. 468/VII—49, dated the 24th April, 1916). While this ruling is of some interest and importance in itself, the scope of its applicability to other analogous cases must not be unduly exaggerated. It was not held that the gift of rights by the widow was valid, but only that plaintiffs had not proved their reversionary right to sue in order to challenge its validity. If any admitted heir at law had sued, it is quite possible or probable that the gift would have been set aside. Again, the finding that plaintiffs as a corporate body had not established their monopoly of right to receive offerings at Taptkund is a finding of fact in respect of this individual case, and depended on the findings of the lower courts on the evidence. It is no precedent laying down a rule for cases of similar claims by other bodies of priests.

Pandit Tara Datt Gairola, vakil for appellants, and *Pandit Mathura Datt Pande* and *Pandit Ansuya Prasad* for respondents.

The order of the Commissioner and the opinion of the High Court were as follows:—

ORDER BY MR. P. WYNDHAM, COMMISSIONER, DATED THE 23RD JUNE, 1914.

This is an important case—the details have been fully set out in the courts below.

It appears that one Bala Ram, a Deoprayagi panda, died leaving a widow.

This widow by two deeds of gift transferred whatever rights her husband had to offerings at (1) Deoprayag in Tehri State, (2) Taptkund in Garhwal (British) to the sons of her deceased husband's sister. This sister had gone across the Alaknanda river to the British village of Bah and married a Brahman there. Defendants (2) and (3) were the issue and are the donees under the deed of gift.

It is important to note that the Tehri property was dealt with in one deed registered at Tehri, while the Garhwal property was dealt with by a deed registered in British Garhwal. In the court of first instance (the Sub-Divisional Officer at Chamoli) the plaintiff's suit was dismissed; that officer held that defendants (3) and (4) could officiate as pandas at Taptkund and the right to collect such offerings could be alienated.

The learned Deputy Commissioner has found that no such transfer could be made by the widow, that the defendants (3) and (4) could not officiate as pandas, and that a decision by the Tehri courts refusing to set aside the deed in case of Deoprayag offerings was not *res judicata*. The deed of gift has been set aside, but an injunction refused. The plaintiffs-appellants come up to this court and pray for an injunction, while the defendants-respondents object on the following points :—

(1) That the finding of the Tehri courts is *res judicata* in this case and the suit should have been dismissed.

(2) That the defendants (3) and (4) have acquired the status of Deoprayagi pandas or rather a status which permits them to officiate at Taptkund.

(3) Costs.

To take the objections first.

The lower court has dealt at length with the question of *res judicata.*

The Tehri court is a foreign court, the subject matter in suit in this case is the right to offerings at Taptkund in British territory, the deed of transfer was executed in British territory and is not the same deed as that which was before the Raja of Tehri.

The property in the Tehri case refers to offerings at Deoprayag in Tehri State many miles from Taptkund.

The offerings are of quite a different nature and for quite a different purpose. I agree with the learned Deputy Commissioner in his finding that the order of the Tehri courts with reference to offerings at Deoprayag cannot operate as *res judicata* in this case.

The next point is to decide whether these defendants who are Brahmans of Bah have the status of Deoprayagi pandas.

The learned Deputy Commissioner has dealt with this at some length and finds that they are not.

Ordinarily the sons of a daughter would not acquire the status of their maternal uncle, but rather that of their father. It is clear that the Brahmans of Bah as a class are not Deoprayagi pandas, but being neighbours (they live across the suspension bridge in British Garhwal opposite the Deoprayag temples and sangam), they may get some share of the offerings—as other neighbours do—as a class they have a different occupation.

The only way in which those defendants can come in is by the proof of the custom of *gharjawain*, in the case of such relationships between pandas' daughters married in Bah and their fathers' home across the river.

This custom is clearly not established and the objection on this point is overruled.

Costs will be dealt with later.

There remains the question on appeal, viz. the injunction which the plaintiffs-appellants seek.

I cannot uphold the learned Deputy Commissioner in his refusal to grant an injunction. The defendants (3) and (4) have been found to have no status as Deoprayagi pandas and the sooner they are stopped from officiating as such in their own right the better. To refuse an injunction may lead to much further litigation and perhaps to a breach of the peace. Pandas when they begin a dispute are inclined to be lawless.

I accordingly uphold the order of the learned Deputy Commissioner, except in the matter of an injunction, and on this point the appeal will prevail.

As regards costs, the appellant would be entitled to his costs in all courts as against the respondent.

OPINION OF THE HIGH COURT, DATED THE 23RD MARCH, 1916.

This is a reference made by the Local Government under rule 17 of the Kumaun rules. The facts of the case out of which the reference arises are these :—On the Tehri side of the Ganges is a temple called Deoprayag, on the British side, at a short distance from that temple and close to the temple of Badrinath, is a place called Taptkund. Pilgrims to Deoprayag go to Taptkund and are conducted there by certain pandas who receive offerings made at the kund. One of these pandas was a man of the name of Tara Datt who is now dead. Musammat Sarda, the widow of Tara Datt, executed a deed of gift on the 7th January, 1911, in favour of the defendants (2) and (3) of the rights which she alleged she had inherited from her husband. The plaintiffs are seven persons who call themselves the panch pandas of Badrinath, and they pray that the deed of gift be cancelled and a decree be made restraining the defendants (2) and (3) from acting as pandas at Taptkund. They base their claim on three grounds : first, that they are the reversioners to the estate of Tara Datt ; secondly, that, according to the customs of the plaintiff's family, if a person belonging to the Panda caste die without leaving heirs, his rights devolve upon the panch pandas alone, and that therefore the plaintiffs are entitled to have the deed set aside. The last ground of their claim is that they are persons who are solely entitled to take gifts and offerings made by the pilgrims at the Taptkund. In the first paragraph of their plaint they say as follows: "No one of the Panda caste except the plaintiffs is entitled to take *dan* and *dakshina* (gifts and offerings) from the pilgrims at the places where the plaintiffs have a right to receive the same." The court of first instance dismissed the suit. The court of first appeal also found in concurrence with the court of the first instance that the plaintiffs were not reversioners of Tara Datt, either directly or remotely, as the plaintiffs alleged, on failure of heirs. These being findings of fact the plaintiffs have on these findings no right to maintain the suit for setting aside the gift. Whether the gift is a valid one or not, unless the plaintiffs have a right to challenge its validity, the court cannot make a decree declaring that it is invalid. We are of opinion that upon the finding that the plaintiffs are neither the direct reversionary heirs of Tara Datt nor persons who had an ultimate reversionary right, they are not competent to sue to have the gift set aside, and on this ground alone their claim to have the gift cancelled ought to have been dismissed. The court of first appeal decreed the plaintiffs' suit for cancellation of the gift, but dismissed it as regards the prayer for an injunction; upon second appeal the learned Commissioner upheld the decision of the first appellate court as to the gift and reversed it on the question of injunction, and made a decree granting an injunction to the plaintiffs restraining the defendants from acting as pandas. The main ground upon which the injunction was granted by the learned Commissioner was that the refusal might lead to further litigation and perhaps to a breach of the peace. This, in our opinion, is no valid ground for the issue of an injunction. The main ground upon which the plaintiffs claimed an injunction was that they alone were entitled as panch pandas of Badrinath to the offerings made at the Taptkund. This right they failed to establish in any of the courts below. We take the finding of the first appellate court to be that they had not any such right.

That court in decreeing the cancellation of the gift proceeded on the ground that the defendants had acquired no right under the gift made by Musammat Sarda, but that in our opinion was besides the question. Whether the defendants had a right or not it was for the plaintiffs to establish the right which they asserted. This the plaintiffs failed to do and on this ground alone their suit ought to have been dismissed. We are of opinion that the decision of the court of the first instance was correct and the plaintiffs' suit ought to have been dismissed with costs in all courts including the costs of this reference in which should be included fees on the higher scale. This is our answer to the reference.

The Hon'ble Dr. Sundar Lal for petitioners; and *The Hon'ble Mr. Moti Lal Nehru* and *The Hon'ble Dr. Tej Bahadur Sapru* for the opposite party.

NOTE.

The draft Bill to which allusion is made in the body of the Commentary has been withdrawn for further examination.

A. G. SHIRREFF,

Under Secy. to Govt., United Provinces.

COMMENTARY ON KUMAUN RULINGS AND CUSTOMS.

I.—INTRODUCTORY.

Scheme of commentary.—In the following notes all rulings referred to without other details than the names of the parties are local rulings and will be found reproduced in this collection. I have endeavoured to set out concisely the system of local customs in a connected way, explaining the local conditions implied or involved in the matters referred to, referring to Kumaun rulings, wherever these were available, and filling in the gaps and noting on peculiarities or omissions in the rulings by the light of local experience and a study of local records, assisted by a body of local opinion obtained under the following circumstances. In 1915 I presided over a committee comprising at first four and subsequently five local gentlemen with a view to drafting a Kumaun Laws Bill, which should include a codification of the principle local customs. After three conferences, at one of which some other representatives of the division were present, a number of clauses embodying local customs were drafted and included in the Bill by agreement. (See appendix.) Subsequently when the present compilation was about to be undertaken, copies of these clauses were circulated to a number of leading Indian residents of the division and their opinions invited as to whether the customs had been correctly recorded. A number of replies have been received, and among them a report of a meeting of retired officials, vakils, village headmen and others held at Almora to consider the subject. This meeting approved the clauses as drafted with two very minor alterations, except that the great majority of those present upheld the old custom excluding daughters from inheritance, as against modern rulings of the courts. The draft clause had followed the rulings.

Other opinions differed on two or three points, mostly of small importance, but the general result is a considerable body of local opinion showing what are the actual customs followed, as certified to by Indian gentlemen in the best position to know. The results of this enquiry and of the drafting committee's conferences form the local opinion, to which I refer on certain points, and together with existing literature on the subject attest the existence of various customs mentioned in these notes, regarding which no rulings are forthcoming.

I have referred in various places to Tupper's *Punjab Customary Law* (3 volumes, 1881) which deals with lengthy inquiries on the same subject in the Punjab. These references, though not directly relevant as regards the existence of customs in Kumaun, are interesting as disclosing the existence in that province, and especially in the hill district of Kangra, of various customs, obsolete or unknown in most provinces, which it shares with the Kumaun hills. This may be of assistance in determining the first question regarding an alleged custom, namely whether it has any real existence, before a court proceeds to the further question whether the custom in question is applicable to the parties concerned.

2. *Scarcity of rulings and reasons for this.*—The scarcity of rulings on points of Kumaun customs, which a search of the Commissioner's record room reveals, is surprising at first sight but is easily explained. About 30 years ago, in order to relieve a congested record room, nearly all the old files of the Commissioner's court down to the latter part of Sir Henry Ramsay's time were weeded out and destroyed. We are thus restricted to some of Sir Henry Ramsay's latest rulings and to those of recent Commissioners from 1886 onwards. There are notes on record of a few earlier rulings of which the files have been destroyed.

Now Sir Henry Ramsay was Commissioner of Kumaun for a longer period than the entire service in India of most officers, and if he ever recorded any rulings discussing and laying down custom, he had doubtless passed this stage long before the latter years of his rule, and knowing all the local conditions and customs by heart he latterly contented himself with the briefest possible orders, often in the vernacular. At the same time it has been recorded that he disliked the principle of fixed rulings on points of custom and often refused to follow his own decisions;

he preferred to settle each case on its merits, as seemed equitable to him at the time by a summary order.

Of more recent Commissioners one or two have been officers possessed of previous experience of Kumaun, but the majority have come from the plains with no previous knowledge of local conditions or customs, and rulings by such officers on points of local customs are of very varying value. In some cases they took the trouble to inquire into the peculiarities of local custom, but in others they followed without any inquiry the ordinary rules of Hindu Law or their own ingrained ideas imported from the plains. When the lower court happened to be similarly inexperienced, an erratic decision was not unnatural, especially as the Kumaun Bar is of modern growth ; Sir Henry Ramsay allowed no lawyers in Kumaun.

3. *Classification of rulings.*—In the old days in Kumaun there was a broad and simple classification of suits and proceedings. All cases, which concerned land were revenue cases, whether they related to questions of tenancy, proprietary rights, land revenue or anything else affecting land or landed property ; all other cases were civil. Thus we find revenue appeals dealing with what would now be the subject of civil suits.

In more recent times the recognized modern classification has been followed, but since the same courts tried both classes of suits and strict accuracy of procedure has never been a distinguishing feature of the local courts, we often find considerable vagueness and confusion in the classification of suits.

The Commissioner's court has always been the High Court of the division in civil matters (subject in recent times to a rarely used power of reference by the Local Government to the Allahabad High Court for opinion), and the Commissioner has been practically the court of final appeal in revenue matters. The Board of Revenue have a revisional power in these cases, but it is seldom used and in the old days very few of the people ever ventured so far.

The decisions of district officers of long experience in the hills were doubtless in many cases sounder and more instructive than rulings by Commissioners of no local experience, but the former can hardly be quoted as rulings.

II.—THE PEOPLE AND TENURES.

4. *The people of the hills.*—An explanatory note regarding the people of the hills and their land tenures, so far as these concern our subject, may be inserted here for the information of courts unfamiliar with the local conditions.

The people are almost all Hindus, and the majority of the few Muhammadans found in the hills are very ignorant and semi-Hinduised in various ways; they have no special Muhammadan local customs.

In the northernmost parts of the division we find the Bhotias, a race of traders, of mixed origin; they very rarely resort to the courts and there are no rulings on record regarding their customs of inheritance, adoption, marriage, etc.; these customs are peculiar to themselves and quite different from those of the Hindus. The Bhotias are however gradually becoming Hinduised to some extent. But leaving aside a few banias in the bazars, more or less recent immigrants from the plains, the vast majority of the population consists of *biths* and doms.

The *biths* or ordinary Hindu inhabitants are so called in contradistinction to the doms, who are probably of aboriginal descent, though regarded by some as low caste Hindus. The *biths* are, broadly speaking, divided into four main classes—Brahmans, Rajputs, Khas-Brahmans and Khas-Rajputs or Khasias.

These four classes comprised between them more than 95 per cent. of the agriculturists (proprietors and tenants) of Garhwal at the last settlement.

The Khasias are the most numerous of these classes; they do not generally wear the sacred thread, but are gradually assuming it; they are really of mixed or Sudra origin, but usually call themselves Rajputs.

The Khas-Brahmans or inferior cultivating (*halbanewale*) Brahmans wear the sacred thread but are generally of doubtful origin; some of them are the offspring of or descended from a Brahman father and a Rajput or Khasia mother. It is these Khasias and Khas-Brahmans who follow the peculiar and often old-fashioned customs, which form the subject of the special rulings and discussions relating to Hindu Law in Kumaun. They form the bulk of the village population.

The pure Rajputs, mostly immigrants of later times, and higher caste Brahmans, generally follow the normal rule of Hindu Law applicable to the twice-born classes. The real test in such disputes regarding custom should thus be whether the parties are of genuine Rajput or Brahman caste or are Khasias or Khas-Brahmans; unfortunately it is often not easy to decide this point among the very numerous local sub-castes in the hills, and it is a principle rarely referred to in specific terms in the rulings. Even in one caste there may be higher and lower subdivisions (*Bachi* v. *Mahenar Singh*).

The doms follow the customs of the village Khasias in a rather vague or lax way; they are a poor and ignorant class of out-castes and their customs rarely come before the courts. There appear to be no special rulings regarding their customs.

5. *Land tenures.*— In the hills only a small fraction of the land belongs to the people; this is *náp* or "measured" land, which has been measured or surveyed, and settled with the villagers at settlement, and comprises the actual cultivated area and in places same blocks of adjoining waste. All other land is *benáp* or "unmeasured" land and is the property of the State.

Proprietary right only exists, legally speaking, in *náp* land including nayabad grants settled under the nayabad rules. Extensions of cultivation into adjoining unmeasured land are however allowed by Government, subject to certain restrictions. They are measured and assessed at the next settlement. The proprietary right in the hills in normal villages belongs to a body of petty cultivating co-sharers (hissadars), holding under a sort of *raiyatwari* settlement and with an organization resembling imperfect pattidari. Each co-sharer has his own separate holding of a few acres, and a share in the village common (measured) land—*gaonsanjait*—where this latter has not been divided up by imperfect partition. All the co-sharers are jointly and severally liable for the village land revenue since each village is one mahal (the term mahal is not used in the hills) and perfect partition is unknown. There may be more than one malguzar or padhan (lambardar) in a village, but this does not involve any division of the joint liability for the land revenue. The malguzar in lieu of, or in addition to, cash dues usually holds some *padhanchari* land as a rent-free tenant of Government, as remuneration for his office. Joint co-sharers in a family holding are known as *shikmi* with the head of the family and are often not recorded in the revenue papers.

The tenancy system of the hills does not concern the civil courts. Tenants comprise *(a)* khaikars, *pakka* khaikars who are practically under-proprietors and *kachcha* khaikars who are occupancy tenants, both paying the land revenue plus a fixed percentage as *malikana* and *(b)* sirtans or tenants-at-will. A proprietor cannot sue in a civil court to contest an order of a Settlement Officer recording a tenant of his land as a khaikar (*Allahabad Weekly Notes*, 1905, page 91).

III.—RULINGS AND CUSTOMS.

(i)—Hindu Law.

6. *Hindu Law.*—The normal rule of Hindu Law followed in the hills is that of the *Mitakshara* school, and where no special local custom is established in respect of any principle of Hindu Law, it is to be assumed that the *Mitakshara* rule is followed.

In applying any test to local custom it is however necessary to bear in mind the origin of the people concerned and their present circumstances. The classes usually concerned in disputes relating to custom are the Khasias and Khas-Brahmans (see paragraph 4 above); now the Khasias (Khas-Rajputs) are the descendants of ancient immigrants into the hills and represent a "blending of pure Aryan with some aboriginal hill stock" (Mr. Goudge; Almora Settlement Report). Similarly, the inferior Brahmans, Khas-Brahmans, are of mixed origin. It may threfore fairly be urged that in applying the rules of Hindu Law to these people the courts should regard them as representatives of the Sudra class and should not insist too strongly on the presumption that they are bound by the strict rules of Hindu Law as applied to the purer and higher castes. These ancient immigrants brought up with them the now old-fashioned customs of their time, and their descendants, living in backward conditions in their remote hill valleys, retained these customs, in ignorance of the changes taking place in the outer world. We thus find obsolete customs, such as that of *jethon* (the eldest sons's extra portion) and *Sautia Bant* (division *per stirpes* among sons) still observed in some families in the hills, while the formalities which have crystallised into necessary conditions for various ceremonies (e.g., adoption) are seldom or never observed among these villagers, who are ignorant of the complicated requirements of the modern Hindu Law. They follow their old and familiar customs and it is difficult for them to understand that the courts require them to prove a local custom, which is to them a matter of course, or to appreciate that the establishing of a custom which (though they do not know it) is in variation of Hindu Law, calls for special and weighty evidence.

The remarks of the Commissioner in his final order in *Fateh Singh* v. *Gabar Singh* (q. v.) are deserving of serious consideration in this connection. They are strongly endorsed by local opinion also.

In dealing with cases relating to custom there are, it must be remembered, three separate questions that may arise, *(a)* whether a certain custom or usage exists, *(b)* if so, what its exact interpretation and application are, *(c)* whether it is followed by the family or caste concerned in the case.

It is not enough to prove point *(a)* in a general way; the direct applicability of the custom to the parties concerned, point *(c)* must also be proved and this is where litigants often fail. It is an issue of fact and if any reasonable proof is adduced in the first court, the question cannot be raised in second appeal (cf. *Narpati* v. *Khimia and others*).

7. *Hindu Law—Marriage.*—The ordinary form of lawful marriage in the hills calls for no special remark. The essential ceremony of *Saptapadi* is always performed. Among the ordinary villagers a price is always paid for the bride, and the form of marriage is thus technically that known as *Asura*. Among the higher castes endeavours are being made to abolish the custom of taking a bride-price, thus making the marriage one of the Brahma form.

For a discussion on the subject of custom in this connection the High Court's remand order in *Fateh Singh* v. *Gabar Singh* may be referred to. There are however two forms of marriage connection which call for special notice in the hills.

It is very common, especially among the Khasia castes, for a man (whether he has or has not another wife living) to take to live with him the widow or the relinquished wife of another man. In some cases the man pays the woman's price to the husband, or if the latter is dead, to the relatives, or failing them, to the woman's family ; in other cases nothing is paid.

A ceremony, the *Ganeshpuja*, is sometimes performed by the family priest and a feast is often given to the man's caste-fellows. The man and woman thus living together are known as *dhant* and *dhanti* (or *dogharia*—the term *dhanti* is considered vulgar by the higher classes). Strictly speaking these terms only apply when the woman's price has not been paid. When the woman is paid for, she is locally regarded as a wife, but the terms are commonly used in a more general sense. This connection is usually a permanent one and is not considered in any way disgraceful among the villagers. Where the woman's price has been paid, the offspring of the connection are socially equal to all members of their father's caste, otherwise they are inferior to some extent, until the price has been paid ; this can be done at any time. It is of course not a lawful marriage ; and the children of such a connection are no doubt illegitimate in law. The point on which the results of this form of connection are constantly coming before the courts, is in the numerous cases of disputed succession turning on the right of inheritance of these illegitimate children. This will be discussed under the head of inheritance.

It may be remarked however that, among the villagers of the Khasia and Khas-Brahman classes, the keeping of a *dhanti* wife is much more common than a second legal marriage, and where one comes across instances (not in connection with a question of inheritance or marriage) of a man having a second wife or children by a second wife, the probabilities are that the second wife is a *dhanti*. It has often been objected by appellate courts that the alleged laxity in respect of marriage in the hills is not supported by sufficient concrete instances ; a perusal however of the rulings in this collection or of any bundle of records taken at random, will illustrate the commonness of this form of unauthorized "marriage" among the ordinary villagers.

8. *Marriage—The levirate.*—The custom whereby the younger brother takes to wife his elder brother's widow *(bhawaj)* is commonly followed among all but the higher castes of Brahmans and Rajputs in the hills. This is not strictly the levirate custom, since the younger brother does not merely beget offspring for his brother, but inherits his brother's widow to be his own wife and sons *(bhaujetha)* begotten on her belong to their natural father. Where the widow goes to live with the younger brother, she is equal to a lawfully married wife and her offspring are legitimate, but where she continues to live in her former husband's house and merely cohabits with the younger brother, she is only a concubine and her children are illegitimate. (See *Padmu* v. *Bhawan Singh*, and *Kirpal Singh* v. *Partab Singh and others.)*

On the death of the younger brother the *bhawaj* is not entitled to a widow's estate in his property; she must look to the sons of her original husband for maintenance *(Jamnu* v. *Musammat Manuli and others).* She would thus take a widow's estate in her original husband's property if he left no sons. If her original husband left no estate she might claim maintenance from the younger brother's estate; this is the local opinion. The term *bhawaj* is loosely used and is often applied to the widow of a cousin or of a more distant relative, though not usually if resident in a different village. In the case of a man's taking such a more distant relative's widow to wife, the position would presumably be that of the usual *dhant* and *dhanti* connection referred to above.

The levirate and this connected custom are discussed by Mayne in his chapter on "Marriage and Sonship" and the prevalence of the custom among certain castes and in certain localities in the Punjab is referred to in Tupper's *Punjab Customary Law,* volume II, pages 94 to 96 and 131 and volume III, page 27. In the Punjab in the case of a brother's widow "consent and cohabitation are all that is required, the sons all inherit as legitimate." (Tupper, volume II, page 131.)

The tekwa.—Occasionally in some Khasia villages the whole of the deceased's property is made over to another man, on the condition that he lives with the widow as his wife.

This second husband is known as *tekwa*. The reversioners by this arrangement give up their claim to any part of the deceased's property. The practice is regarded as a somewhat immoral one (Pauw : Garhwal Settlement Report, page 44). I have never seen any decisions or cases referring to this custom.

9. *Hindu Law—Adoption.*—Adoption in the ordinary sense does not appear to be very common in the hills. Where instances occur among the ordinary village classes, they are commonly characterized by the absence of any of the usual formalities of the Hindu Law. If it be accepted that the Khasias are really of the Sudra class, this is in accordance with the normal rule (cf. 6 Allahabad, page 281 ; Trevelyan's *Hindu Family Law*, page 153, etc.). The only local ruling on the subject (*Padmu* v. *Bhawan Singh and others*) refers to this absence of any formalities ; Bhawan Singh took a widow with her son to live with him and treated the boy as his son ; it was held that he had practically adopted the boy and that such informal adoption is all that takes place among the ordinary villagers in the hills. To such cases the principle of *factum valet* may in any case often be applied (cf. 9 Allahabad, page 253 ; 21 Calcutta, pages 460 to 487 ; and Tupper's *Punjab Customary Law*, volume III, page 82). The necessary qualifications for an adoption may be presumed to apply in the hills, as elsewhere, i.e. as regards capacity to adopt or to be adopted, etc.

The gharjawain.—A special and fairly common form of adoption in the hills is that in which a man, who has no son, marries his daughter to a son-in-law who agrees to live permanently in his house, and is known thereafter as the *gharjawain*. In this case if the married couple continue to live permanently with the father, they inherit the estate, but if they leave him and go to the son-in-law's house, they are disinherited. It must be remembered that the hill people do not recognise the right of the daughter to inherit (see below).

It is common for the father to make over his property, or part of it, to the couple during his lifetime, usually by a deed declaratory of the arrangement. Such adoptions of a *gharjawain* are sometimes made by a widow, who often goes through the form of nominally selling the estate to the son-in-law on the pretence that he has paid or is to pay the debts of the deceased.

Such an adoption by the widow is presumably invalid unless she has been expressly authorized to make it by her late husband.

I have found no rulings of the Kumaun High Court on this custom.

The same custom is found in Madras in one caste (cf. 4 Madras, page 272), and is apparently common in various parts of the Punjab among certain castes. (See Tupper, volume I, pages 74, 79 and 80, volume II, pages 75, 158, 186, 209, 213 and volume III, page 84).

From the customs recorded at pages 74, 79 and 80 of volume I of Tupper's work, it appears that in the districts there referred to the inheritance of the *gharjawain* and his wife or their issue depends on their being placed in possession of the property by the father before his death. In the Punjab, as in these hills, the daughter is very commonly not allowed to inherit; hence this device of the adopted son-in-law. It was proposed by Sir W. Rattigan in his draft Punjab Customary Laws Bill, 1897, clause 13*(b)* (1) (2) to give legal sanction to the daughter's inheritance in the circumstances of this custom in preference to all collaterals.

10. *Hindu Law—The joint family.*—The unity of the joint Hindu family is less strictly observed in respect of alienations in the hills than elsewhere. The question is however not free from doubt. The only direct ruling on the subject appears to be *Sukhdeo Prasad* v. *Gauri Datt* in which the ordinary rule of Hindu Law was applied; an alienation by a younger brother of his share of the joint estate without the consent of his elder brother was set aside on the latter's suit.

On the other hand Mr. Pauw in his Garhwal Settlement Report remarks . . . "But in the hills the *shikmi* [joint] hissadar has always been permitted to exercise full proprietary rights over his nominal share of the inheritance, and to claim that his portion shall not be held responsible for debts due from the manager, unless he is especially mentioned as liable in the decree. A fraudulent use is frequently made of this power, particularly in the case of private sales."

And the committee which drafted the Kumaun Laws Bill in 1915 agreed to the insertion of the following clause :—

"A male adult coparcener in joint family property, other than a son or a grandson during the lifetime of his father or grandfather, shall be deemed to be entitled at any time to alienate his ascertainable share of the joint family estate without the consent of his coparceners, subject to the liability of his share for any common debt owed by the coparceners."

This clause was again approved at the public meeting convened to consider the whole subject at Almora in April, 1916. On the other hand a member of the 1915 drafting committee (the Hon'ble Pandit Tara Datt) now suggests that there has been confusion between the joint Hindu family and a jointly held or jointly recorded estate. Formal partitions through the courts have never been common in the hills, considering the vast number of petty proprietors, but it is extremely common for joint co-sharers (usually collaterals), who are no longer a joint family, to divide up their lands by a private partition *(gharbatwara)*, while allowing the whole ancestral estate to remain jointly recorded in the record-of-rights. The tendency of the joint family in the hills is to separate (as indicated by these private partitions).

Pandit Tara Datt would therefore reduce the difference from the normal rule of Hindu Law to one of legal presumption, and would say that in Kumaun the jointness of the family should not be presumed in the case of collateral relatives whose shares are recorded as joint in the revenue papers; in the case of alienations by such collaterals of their respective shares, the burden of proving that they are members of a joint family should be on the person impugning the transaction. This however is contrary to the general consensus of local opinion, which would go considerably further as indicated above. An illustration of what Pandit Tara Datt refers to, the joint holding of a separated family and the dealings of co-sharers in such holdings, will be found in *Chandri* v. *Kalmu and another.*

11. *Joint family—Maintenance and partition.*—Where the elder brother's widow is taken to wife by the younger brother she is entitled, on the latter's death, to maintenance (or a widow's estate) from her original husband's estate (see paragraph 8 above, *Jamnu* v. *Musammat Manuli*). In default of such estate she may claim maintenance from the younger brother's estate,

according to the drafting committee of the Kumaun Laws Bill and local opinion. Similarly, by such opinion a *dhanti* wife (see paragraph 7) is entitled to a widow's estate only when no lawfully married wife also survives the husband; where such a lawful wife survives, the *dhanti* is only entitled to maintenance from her second husband's estate.

A daughter, when excluded from inheritance by collaterals, has been held entitled to maintenance from her father's estate *(Jamnu* v. *Musammat Manuli and others).* The question of the daughter's exclusion from inheritance is dealt with below (see " Inheritance ").

Askot being an impartible estate, the relatives of the Rajwar are entitled to maintenance from him *(Lala Ranjit Singh* v. *Rajwar Pushkar Pal and others).*

Partition.—The only peculiar custom relating to partition is that of *Sautia Bant* or division of the father's estate *per stirpes* among the sons by different wives (i.e. if *A* has one son by one wife and three sons by a second wife, then by *Sautia Bant* the one son takes half the estate and the three sons the other half); where this custom is put forward, it is commonly maintained on the ground of a division on this principle having been carried out by the father during his lifetime. It comes more properly however under the heading of " Inheritance" and is discussed under that head. See also under that heading for the custom of *jethon,* which is also connected with partition.

12. *Inheritance—Sons.*—There are various peculiar local customs relating to inheritance. The most prominent of these is that, whereby among the Khasia and Khas-Brahman castes the illegitimate sons by a *dhanti* wife (see paragraph 7) inherit equally to their father with sons by a lawfully married wife.

The Khasia castes, as remarked above, are of mixed origin and are not pure Brahmans or Rajputs. They would thus naturally follow the rules of the Sudras, and among Sudras an illegitimate son is entitled to a share (though not a full share) in his father's estate.

In the hills however it is beyond doubt that illegitimate sons among Khasia and Khas-Brahman castes do inherit equal shares with the legitimate sons as a matter of right, though there are frequent contests over such inheritances. Such cases turn on the question whether the custom of illegitimate sons inheriting is followed by the particular caste in question, and unless the parties belong to a pure Rajput or Brahman caste, there is an undoubted presumption in favour of the custom. There is often however, as indicated in paragraph 4, some difficulty in ascertaining the status of a sub-caste. A Khas-Rajput will always or nearly always call himself a Rajput. One constantly comes across cases, where the question of this custom is not in issue, in which the facts show that such inheritance had taken place.

Among the hill people of the Kangra district a similar custom and a similar distinction of castes prevail. There the distinction is between those castes (or clans) whose women " affect seclusion and do not work in the fields " and who do not contract widow marriages, and those whose women do work in the fields and who do marry widows; among the former the son of a " kept woman " as opposed to a lawfully married woman does not inherit; among the latter the son of any kept women (not of degraded caste) by custom shares equally with the son of a lawful wife (Tupper, volume II, page 184).

A similar test or classification of castes would work very fairly well in the Kumaun division.

These illegitimate sons however do not, according to most rulings, inherit to collaterals, and cannot control their father's disposal of property.

Rulings on the subject may be summarized as follows:—

In *Nar Singh* v. *Ram Singh and others* Mr. Ross awarded four-fifths of the father's estate to the four sons by a *dhanti* and one-fifth to the only son by a lawfully married wife; the latter claimed one-half of the estate by *Sautia Bant.* The parties were Khas-Rajputs of the Bhakuni caste.—*(September,* 1887.*)*

Colonel Erskine in *Hari Kishan* v. *Radhapati* (July, 1890) held that the custom of illegitimate sons among village Brahmans succeeding to collaterals was not established; the lower court's remand report mentions that the principle of such sons succeeding to their father was not contested by the respondent and was proved by the evidence.

In *Bach Ram and another* v. *Tarapati and others* the right of illegitimate sons to succeed to their father's and half-brother's estate was established; the parties were Khas-Brahmans, Mr. Giles' order of August 14, 1891, upheld by the Board of Revenue.

In *Jharu* v. *Nathu and others* however Mr. D. T. Roberts upheld a decision applying the ordinary rules of Hindu Law to the respective inheritance of an illegitimate son and legitimate daughters of a village Brahman; no reference to, or enquiry about, local custom was made however, and it appeared that the father had divided the estate during his lifetime giving shares to the three children—(*February* 2, 1893.)

In *Umrao Singh and another* v. *Jhagru* the title of an illegitimate brother to half the estate had been admitted by the legitimate brother (Khas-Rajputs); the Commissioner, Colonel Erskine, was not prepared, without further careful enquiry, to accept the general principle laid down by the lower court that in Garhwal sons by *dhantis* inherit equally with the issue by a lawful wife.—(*March* 13, 1894.)

In *Bachi* v. *Mahenar Singh* it was held that among the *bisht* caste of Rajputs, though illegitimate sons may inherit a share in their father's estate, they do not inherit to collaterals. The father had divided up his estate equally among all the sons, and on the death of one of the legitimate sons the illegitimate son claimed a share in his estate. A special remand enquiry into the custom of the caste went to show that among the *bishts*, a very numerous caste, there are different grades, some higher and some lower, and they might follow different customs.—(*Colonel Grigg's final order of April* 28, 1894.

In *Karam Singh* v. *Sher Singh and another* Mr. J. S. Campbell held (June 25, 1913) that though illegitimate sons among Khasias inherit a share of their father's estate, their rights only accrue on their father's death; they cannot control his disposal of his property during his life.

In *Fateh Singh* v. *Gabar Singh* the parties were *Bhandari* Rajputs; the father had taken a *dhanti* wife with the performance of the *Ganeshpuja* ceremony. The Local Government on the High Court's opinion remanded the case for enquiry as to whether this form of marriage was a lawful marriage or not. It was not a lawful marriage, but by a confusion of issues it was held that this finding involved the non-possession of rights by the son of the *dhanti* wife, which was really quite a different issue and did not follow from the above finding; see notes on the case. (Final order by Mr. Wyndham of April 15, 1916.) The custom was declared by the committee drafting the Kumaun Laws Bill in 1915 in the following clause which has been approved by local opinion (excepting one or two gentlemen who consider that stricter morality should be enforced by legislation, while not contesting the existence of the custom) :—

Clause 13.—" In the circumstances (i.e. where a man has taken a *dhanti* wife) and among the castes (Khas-Brahmans, Khas-Rajputs and doms) referred to in section 12, the courts may presume that the offspring of such a connection inherit equally with the offspring by a regularly married wife, and that in the absence of offspring of such married wife the offspring of such a connection inherit their father's estate.

Children by the elder brother's widow.—A subsequent clause laid down a similar rule for the inheritance of children born to the younger brother by the elder brother's widow. (See paragraph 8, levirate) this principle has been laid down in a somewhat indefinite way in *Padmu* v. *Bhawan Singh and others* (q. v.) and indirectly confirmed, though restricted in its application in *Kirpal Singh* v. *Partab Singh and others,* where it was held that the son of a man by his elder brother's widow does not inherit his father's estate, unless the father takes the widow to live in his own house and treats her as of his own family. (See also *Dulab Singh and another* v. *Musammat Ganga and another* for an instance of a daughter by a brother's widow inheriting.) In parts of the Punjab, where such marriages are customary, children by the elder brother's widow are legitimate and inherit (Tupper, volume II, pages 131, 162 and 174).

13. *Inheritance—Sons—Sautia Bant.*—A custom not infrequently alleged as being followed by a particular family is that of *Sautia Bant* (inheritance *per stirpes*) between the sons by different wives. (See paragraph 11, Partition.) This is not a general custom nor is it one observed by certain castes or classes.

It appears to be followed as a custom by certain families or in certain villages, but when set up it is most usually supported by a will or by a partition effected by the father during his lifetime. It is an abnormal custom and the presumption even in the hills is strongly in favour of the usual rule of *Bhai Bant* (inheritance *per capita*), each son taking an equal share. Mr. Pauw, Deputy Commissioner of Garhwal, in a judgement on the subject said that the custom appeared to be of Nepalese origin and of comparatively recent introduction. I do not know on what grounds he asserted this. It would seem more probable that the custom is an old-fashioned survival from early times, connected with matriarchal ideas (cf. Mayne on Partition). In the Punjab, where it is known as Chundavand, it prevails in the Gurdaspur district, among the Rajputs and some others of Gurgaon, as a village or family custom in Rohtak, and is universal in the Kangra hills (Tupper, volume I, pages 72 and 78; volume II, pages 138, 175 and 183).

In the oldest ruling on the subject (November 23, 1861) Sir Henry Ramsay laid it down that in the absence of a will a partition by *Sautia Bant* cannot be made by the courts *(Nand Ram* v. *Bhajan Datt).* In *Ratan Singh and others* v. *Sher Singh* he ruled that in the absence of a written agreement or will, or the strongest evidence, a *Sautia Bant* ought not to be given. In *Padmu* v. *Shib Datt and others* however he upheld a *Sautia Bant* which from a partition deed and the facts of the existing possession appeared to have been carried out by the father some years before.

In *Rabi Datt* v. *Daya Ram and others* the Board of Revenue held that *Bhai Bant* is the normal custom in Garhwal and special authority (such as a special agreement or disposal of property) must be proved to alter the law in a particular case.

An instance of the custom being proved to exist in a particular family will be found in *Narpati* v. *Khimia and others*, in which the High Court pointed out that the question whether a given custom prevails in a particular family is a question of fact and no second appeal lies on the point.

In another case, not reproduced *(Ganga Datt* v. *Bhajan Datt and others)* it was found on the evidence that *Sautia Bant* had been carried out and the parties were in actual possession accordingly and this arrangement was upheld by the Commissioner (Mr. D. T. Roberts). And in *Asaru and others* v. *Bali Ram and others* (the record of which has not been found) Sir Henry Ramsay quashed a *Sautia Bant* that had been carrid out by a father on the ground that the mere fact of his having two wives living in separate houses and at feud with one another did not justify him in making a *Sautia Bant*.

14. *Inheritance—Sons—Jethon.*—The custom of *jethon*, the extra portion of the first-born son *(jetha larka)* is mentioned by Mayne as an obsolete custom. The eldest son was "originally entitled to a special share on partition, either a tenth or a twentieth in excess of the others, or some special chattel, or an extra portion of the flocks." This custom is not infrequently alleged in Kumaun but is seldom established.

In an examination of the memorandum of village customs in Garhwal however it was found that 10 villages out of 44 taken at random recorded the custom as prevailing, while an eleventh noted it as sometimes followed. In a sample memorandum of a Naini Tal village it was stated that "sometimes fields, sometimes moveables are given by way of *jethon*."

Cases are occasionally met with where inequalities between the shares of brothers are explained by this custom having been put into force, but there does not appear to be any fixed or recognised principle determining the extent of the extra share, and from the rarity of cases on the point it would seem to be a subject usually dealt with by family agreement or the father's decision, when he makes a partition.

In the only ruling forthcoming on the subject *(Jhagar Singh* v. *Ishri Singh)*, the Commissioner ruled that "the claim of *jethon* must be incontestably proved to be a custom of the individual family concerned," and disallowed a *jethon* share, which the lower court had decreed on an arbitration award.

In the Kangra hills the custom is said to be general; a field, a cow, or ox, or other valuable thing is given to the eldest son as *jethunda;* among the Khatris of Multan the eldest son gets an extra one-fourth, and in Ambala the eldest son inherits something extra as *jathkun* (Tupper, volume II, pages 182 and 269 ; volume III, page 41).

15. *Inheritance—Daughters.*—By the ordinary rules of Hindu Law the daughter comes next to the widow in order of inheritance, but, as noted by Mayne, this rule is subject to local customs excluding the daughter from inheritance. Such a local custom has been universally followed in the Kumaun hills by all classes, the daughter and her son not being considered as heirs at all. All local opinion confirms the existence of this custom, though two or three gentlemen consider that in view of modern decisions recognizing the daughter's rights it would now be difficult to establish the custom and the ordinary rule should be introduced. No rulings have however been discovered laying down definitely the right of daughters in general to inherit, though in two recent cases *(Dulab Singh and another* v. *Musammat Ganga and another* and *Budh Singh* v. *Musammat Rangi)* it was held that in the case of pure Rajput castes the normal rule of *Mitakshara* Law must be followed, unless the parties opposing the daughter's claim could establish a local custom excluding them. Mr. Pauw in his Garhwal Settlement Report (1896) remarks: "The daughter's position in the hills is much weaker than under ordinary Hindu Law. Though decisions such as *Bahadur Singh and others of Mathana, Ringwarsyun* v. *Prasadi*, 28th August, 1885 (Mr. Ross, Commissioner) and *Kura of Talli Kolu, Khatli* v. *Lalu*, 3rd May, 1892 (Mr. Roberts, Commissioner) have declared the daughters entitled to succeed in preference to unrelated co-sharers of the village and distant relatives, still her right is not generally recognized by the people themselves."

The record of the first of the two rulings mentioned is not discoverable. The second [*Lalu* v. *Kura* (q.v.)] does not lay down any definite rule regarding the daughter's inheritance ; it is true that the Commissioner remarked that it was for Lalu to prove that he was heir by Hindu Law, but he went to say that as Lalu proved nothing, except that he was of the same caste as the deceased Lalmani, he had no claim and it was unnecessary to decide the general question as to under what circumstances and with what limitations the daughter was entitled to inherit. There are no rulings forthcoming which discuss the general local custom at all

In *Jharu* v. *Nathu and others* two legitimate daughters obtained a decree for a house of their father's against their illegitimate brother, but no plea of custom was raised and the father had divided up his property in his lifetime.

On the other hand in *Jamnu* v. *Musammat Manuli and others* Colonel Erskine ruled without any hesitation that the daughter had no claim to inherit her father's estate as against male collaterals (a paternal uncle and first cousins) whatever her rights to maintenance might be. The parties were Khasias and the ruling is thus not in direct conflict with those of *Dulab Singh and another* v. *Musammat Ganga and another* and *Budh Singh* v. *Musammat Rangi,* referred to above, in which the reason given for presuming the normal rule of Hindu Law to apply was that the parties were pure Rajputs. At the same time no reference to the caste of the parties was made in *Jamnu* v. *Musammat Manuli* and this ruling represents more correctly the old-established custom of the hills.

Among the Hindus of the Punjab there is a widespread custom excluding daughters from inheritance [cf. Tupper, volume II, pages 145, 177, 184, 209 (100) and 259 ; volume III, page 48].

The daughter's son would naturally be excluded on the same principle, but there are no rulings discoverable on the point.

As remarked above (paragraph 9) the device of the adopted son-in-law *(gharjawain)* is often resorted to in these hills, as in the Punjab, to enable the daughter to succeed.

16. *Inheritance—The village community.*—In default of all heirs under Hindu Law the remaining co-sharers of the village are the ultimate reversioners to the share of a deceased co-sharer, which becomes village common land. This is mentioned in the memorandum of village customs of Mr. Beckett's Kumaun Settlement (1874) and the right has been recognized in *Bach Ram* v. *Chanar Singh and others* and in *Tila* v. *Bhagwat Singh and others.*

17. *Inheritance—The Naik caste.*—The Naiks are a peculiar caste, who hold a limited number of villages in various parts of the hills. They do not belong to any of the main classes of

Hindus in the hills, though they generally observe the customs of the Khasia castes. Their female children are invariably (or practically invariably) devoted to prostitution as soon as they attain the age of puberty and go down to the plains to practise their trade. They often return later and marry or form connections with men of their caste (who also take Khasia wives). Being the chief money-makers of their caste the females take a more prominent position than those of other castes, and as is natural in the circumstances rules of descent and legitimacy are not too rigidly applied.

Their customs of inheritance were inquired into at considerable length in *Lal Singh and another* v. *Musammat Sundar*, where it was decided that in this caste sisters succeed to ancestral property and inherit to brothers in default of male descendants. In *Diwanu* v. *Lungi* it was laid down that in a community of Naiks it would be superfluous to enter too closely into questions of legitimacy; sons of a man by the same mother should be regarded as his heirs and as heirs to each other.

18. *Inheritance—Jogis—Priestly rights.*—A point on which there is perhaps some doubt is the rule of succession in the case of the cultivating classes of Jogis and Gusains. Mr. Pauw in his Settlement Report says: "Among the various castes of jogis known as giri, puri, nath, bairagi, etc., the succession lies to the *chela* or disciple, not to the son. This is not improbably a remnant of the time, when this class was celibate. At the present time celibacy is seldom observed, while a large number, particularly near Srinagar, are mere cultivators and are only to be distinguished from others by their orange-coloured dress and the custom prevailing amongst some of them of wearing large wooden rings in their ears."

The rule of succession given by Mr. Pauw was approved as a presumption, until the contrary should be proved, by the drafting committee of 1915 and has been accepted by local opinion generally, but one or two gentlemen have expressed doubts of its correctness, and think the presumption should be in favour of the sons inheriting.

As regards succession to certain priestly rights at Badrinath and Kedarnath, the drafting committee of the 1915 Bill framed the following clause: "Among the pandas of Badrinath and Kedarnath the courts shall presume that the priestly rights known as *Pandachari Vrithi* rights [rights of acting as priests to the pilgrims at certain sacred spots] are personal in the panda castes, and that daughters married to men of non-panda castes do not inherit such rights, except where the daughter's husband in such a case is lawfully adopted as a *gharjawain*." This is approved as correct by local opinion. (See also paragraph 27 below.)

19. *Hindu Law—Woman's estate.*—The only peculiar custom relating to a woman's estate appears to be that whereby a widow having inherited her widow's estate forfeits her rights by subsequent unchastity. There are no rulings on this point, but it is accepted by local opinion as the universally prevailing custom in the hills. The declaration of the custom was embodied in the 1915 draft Bill in the following clause:—

> "If a widow subsequent to inheriting her widow's estate voluntarily leaves her late husband's home and goes to live with another man, she shall be deemed to have forfeited all interest in her late husband's estate."

An essential part of the custom appears to be the restriction of its operation to cases (such as that of the *dhanti* wife, see paragraph 7) where the widow abandons her late husband's house and resides with another man. This custom is also common in the Punjab (cf. Tupper, volume II, pages 144, 177 and 184; volume III, page 46) and was embodied in Sir William Rattigan's draft Bill on Customary Law, clause 18. Presumably the elder brother's widow, when taken to wife by the younger brother, would be an exception (cf. Sir William Rattigan's draft Bill).

An old-fashioned local custom whereby widows used to apply to the District Officer for permission to alienate the estate, or any part of it, did not interfere with the rights of the reversioners to contest such alienations by suit, even when permission had been given. (See *Mathura Datt* v. *Musammat Dharam Sundari and another.)* Such applications were not uncommon a few years ago.

III.—PRE-EMPTION.

20. *General.*—The custom of pre-emption prevails in Kumaun as elsewhere and follows much the same lines. Its origin in the hills is uncertain; Mr. Giles, an officer of considerable experience, remarked in a remand enquiry in 1890 that the custom was unknown in pre-British times and "was borrowed from the Muhammadan Law and introduced into Kumaun by British officials for political purposes." However this may be, the custom has been in force for many years and is the source of much litigation and annoyance as elsewhere.

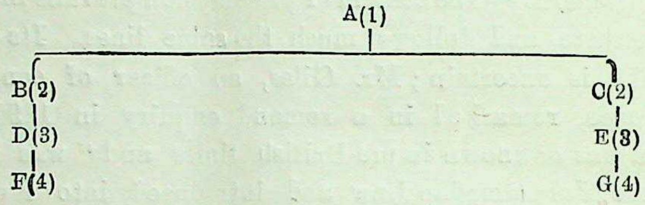
A full statement of the local custom as it has been finally developed is recorded in Mr. Pauw's *Garhwal Settlement Memorandum of Village Customs* (1896), which contains the same rules on the subject for all villages. The rules as there given are as follows:—

(1) The option of purchase must first be given to the vendor's kinsmen and then to other co-sharers of the village. If they decline to buy, the vendor may sell to an outsider. If he gives no prior notice to his kinsmen and the co-sharers they may claim to pre-empt.

(2) The nearest relative (within the third degree) of the vendor has, if he is a co-sharer, a right of pre-emption against any purchaser who is an unrelated or distantly related co-sharer.

(3) If the land is sold to an outsider, then the first right of pre-emption lies with relatives within the third degree (being co-sharers) and, failing them, with other resident co-sharers of the village.

The custom is not stated in full in the records of the other districts, but follows the same rules except that the qualification of residence for a claimant (rule 3) is a disputed point. (See rulings below.) Local opinion is in favour of abolishing this restriction. The general principles of the custom as recorded above are accepted without dispute and there are rulings on most points regarding which any doubt might arise. The method of reckoning the third degree of relationship *(pusht)* has not been discussed in any rulings, but this is always calculated by counting back to the common ancestor number 1 and including the parties themselves, thus—



D and *E* are related within the third degree, but *D* and *G* are not, nor are *B* and *G*.

21. *Pre-emption—Rulings.*—The principles laid down b rulings may be summarised as follows :—

Relative, but not co-sharer.—A near relative of the vendor, who is not a co-sharer in the village, has no right of pre-emption at all. (See *Parsi Sah* v. *Bijai Ram and others,* which refer to other similar rulings and discusses the whole custom.)

Claims by non-resident co-sharers, near relatives and others.—There are two points in connection with the pre-emption custom on which there is a conflict of rulings ; one is with regard to the qualification of residence in the village for a claimant to pre-emption. The circumstances of the various rulings need to be distinguished carefully. The first ruling. (*Gajadhar* v. *Jora and others,* 1902) laid down that a non-resident co-sharer (who was not a near relative of the vendor) had no right of pre-emption against an outsider purchaser (not a co-sharer) in Garhwal district, following the memorandum of customs.

In the next ruling (*Rabi Datt and another* v. *Parjapati,* 1909), it was held that a non-resident co-sharer, who was related to the vendor within the third degree, had no right of pre-emption against a purchaser who was a resident co-sharer but not related to the vendor ; this referred to ancestral land. This ruling was directly reversed by the same Commissioner in *Lachi Negi* v. *Joga and another* (March, 1913), the circumstances being exactly the same ; from the court's remarks it would also dissent from the distinguishable principle laid down in *Gajadhar* v. *Jora and others* (see above). The judgement is worth perusing.

The ruling of *Lachi Negi* v. *Jega* was again followed in *Narain Datt* v. *Bhola Datt and others* (August, 1913) and the principle further extended in this case to non-ancestral land. This last extension of the principle has however since been overruled (see below).

Thus far however we have it laid down as the present custom that—

(a) a non-resident co-sharer in Garhwal has no right of pre-emption *(as a co-sharer)* against a purchaser who is not a co-sharer in the village and

(b) a relative of the vendor within the third degree who is a co-sharer, but not a resident in the village, has a right of pre-emption, as a relative, against a resident co-sharer in the village (who is not related or more distantly related to the vendor) in respect of ancestral land. (A near relative who is not a co-sharer in the village at all has no right, see *Parsi Sah* v. *Bijai Ram and others* quoted above.)

Local opinion is, as mentioned above, against making residence in the village a necessary qualification for a claimant.

Non-ancestral land—Claim by near relative.—As mentioned above the ruling of *Narain Datt* v. *Bhola Datt and others* extended the right of a near relative to non-ancestral land.

This was in conflict with a ruling of Sir Henry Ramsay in *Bali* v. *Amlanand* (September 1873), where it was held that a near relative, as such, has no right of pre-emption in non-ancestral land. The record of this case has however been weeded or mislaid and cannot now be found.

This latter ruling has however again been re-established in *Parjapati* v. *Kirpal Singh and another* (1915), which went to the High Court on a reference and in which it was held that the claimant failed to prove the custom supporting his right.

A near relative has therefore no special or prior right in respect of non-ancestral land. This seems reasonable.

Waiver of claim and subsequent sale.—Failure to claim pre-emption on the occasion of one sale does not debar a claim on the subsequent sale of the same land *(Gajadhar* v. *Jora and others)*.

Claim by co-sharer by purchase.—A co-sharer, who has himself become a co-sharer by purchase, has the same right of pre-emption as any other co-sharer *(Moti* v. *Lal Singh and another).*

Principal (asl) *village and hamlet* (laga).—For the purposes of pre-emption the principal *(asl)* village and its subsidiary villages *(lagas)* are one. A co-sharer in a *laga* has no right of pre-emption against a purchaser who is already a co-sharer in the principal village, but not in the *laga (Datt Ram* v. *Raghunathu and others).*

Buildings.—There is no custom of pre emption in respect of buildings apart from land *(Jai Kishan and others* v. *Maheshanand and another).*

Tenants and pre-emption.—Khaikars [who are either *(a)* under-proprietors or *(b)* occupancy tenants, see paragraph 5] have no *locus standi* in respect of pre-emption. If a khaikar purchases the proprietary right over his own land, a co-sharer of the village has a right of pre-emption against him *Narain Singh and another* v. *Chanar Singh* and *Pan Singh* v. *Dan Singh).*

Contractual stipulation overrides pre-emptive right.—Where land is sold, subject to a condition for re-purchase in the event of a re-sale, such condition overrides any customary right of pre-emption *(Joga and another* v. *Amba Datt and another).*

Town lots in Almora and Muhammadans.—The custom of pre-emption extends to town lots in Almora ; pre-emption can be claimed by a joint co-sharer with the vendor. Almora Muhammadans do not observe the legal forms of the *Shara Muhammadi,* but follow the local rules applicable to Hindus. Among local Muhammadans a claim by a near relative (not a co-sharer) might also be entertained *(Roshan Din and Ali Bakhsh* v. *Mukim and Lachmi Ballabh).* (See however the Deputy Commissioner's remand report in this case regarding local custom.)

Villager removing to new site.—Where a village was acquired by Government and the villagers emigrated *en masse* to a block of land granted by Government and founded a new village there, it was held that they carried with them the customs of pre-emption applicable to the old village *(Narotam and another* v. *Rochfort and others).*

IV.—MISCELLANEOUS.

22. *Village community—Common lands.*—In the village communities of the hills with their land-holding system resembling the imperfect pattidari of the plains, there is usually an area of common measured land *(gaon sanjait)* owned jointly by all the co-sharers. It is often waste pasture land, sometimes let out to tenants and sometimes in part cultivated by some of the co-sharers. It is managed by the headman (malguzar or padhan of the village, subject to the approval of his actions by the other co-sharers, who have their remedy by suit if he mismanages it or does any act prejudicial to the common interest. The common land sometimes receives accessions of area from heirless holdings reverting to the coparcenary body as the ultimate reversioners (see paragraph 16).

As regards dealings with the common land, if it is uncultivated waste, the consent of all the co-sharers is necessary before it can be brought under cultivation (so long as it remains common property) ; see the Board's order in *Jasodhar and others* v. *Kamlī and others,* and the Garhwal Settlement agreement of 1872, "(5). If we wish to cultivate the undivided land of the village, we shall by common consent of all the hissadars divide it." Where this is not agreed to the party wishing to cultivate must get their proportionate share separated by partition (see ruling quoted above). A co-sharer may in certain circumstances lose his right to a share in the common land *(Swaru and another* v. *Bhawanu)* ; but this is unusual.

Partition—Mawari Bant.—Rights on partition of the common land are normally proportionate to each co-sharer's share of the village land revenue. In some villages however the peculiar custom known as *Mawari Bant* or partition by families prevails. In this case each "family" of the village community takes an equal share irrespective of the area and revenue of their respective holdings. The custom, if it prevails, should be found noted in the village settlement papers, and the common land in such cases is sometimes recorded as *gaon sanjait mawari bant.* The "families" will also often be found recorded in the settlement papers, otherwise it may be difficult to determine the original "families" among the changing shares a good many years later.

An instance of this custom being enforced against the wishes of the majority of the co-sharers will be found in *Dalip Singh and others* v. *Ram Singh and others*.

It goes without saying that no headman or co-sharer can alienate or create any interest in any specific area of the common land without the consent of all the co-sharers (cf. *Durga and others* v. *Jai Singh and another)*.

Padhanchari land.—Padhanchari land (see paragraph 5) is the property of the State and the padhan (or his representative, where he does not live in the village) is only a rent-free tenant in it.

No one can acquire rights in it adverse to the padhan, and though a padhan can put in tenants or lessess for his lifetime, each successive padhan must succeed to it unencumbered *(Bachua* v. *Ramua and others)*. Similarly, in *Nand Lal* v. *Musammat Dharm Sundari and others* (S. C. A. no. 4 of 1895) (not reproduced) Colonel Grigg, Commissioner, on the 13th/14th May, 1895, rejected the claim of the family which had held the padhanship for a long time and lost it, to proprietary right in the padhanchari land, holding that whatever the nature of their tenure might once have been, the land was now only "padhanchari—the allowance in land granted to the padhan."

23. *Unmeasured land—Extensions of cultivation.*—As explained in paragraph 5 all land in the hills, other than that measured and recorded at settlement at private property, is the property of the State. The villagers are however executively permitted under certain restrictions to extend their cultivation into adjoining unmeasured *(benap)* waste. Apart from this, blocks of land separate from the old cultivation may be formally granted in proprietary right as nayabad grants, a summary settlement being made with the grantee, and a map and record-of-rights prepared. In such nayabad grants the grantee becomes an ordinary proprietor, subject to any special conditions of the grant and the ordinary rules of law and custom will apply. It is open to any one claiming a share and possession in such a grant to bring a suit for that purpose, the grant not being conclusive *inter partes* [*Bachi and others* v. *Chanar Singh* by Colonel Grigg,

Commissioner, 9th March, 1899 (not reproduced) following *Indian Law Reports*, volume VIII, Allahabad, page 649.]

Cases relating to extensions of old cultivation into adjoining *benap* land are being reserved to the revenue courts. There are frequent disputes over these between rival claimants or relating to customary rights of way, pasturage, etc.

The question of jurisdiction will however be complicated in practice by the hillman's habit of dealing with his extensions of cultivation (to which he has by custom a good title as against other cultivators, though not against the State) jointly with his measured proprietary land. Thus a man will sell or mortgage his 2 acres of measured land in a village, together with his *benap* cultivation for a lump sum by one instrument. Disputes about such transactions or cases regarding succession to, or possession of, estates comprising *benap* cultivation as well as measured land must cause some confusion between the two classes of courts.

Such cases however should not present much difficulty. The unmeasured land belongs to the man who reclaims it, and is subject to the same customary rights and rules as any other property. Any disputes specifically relating to the extension into *benap* will go before the revenue courts. In *Jai Kishan and others* v. *Kirpal Datt*, a ruling relating to one aspect of such extensions have been reproduced.

24. *Water rights.*—As the measured area in the hills is confined to cultivated, or occasionally, culturable land, the beds of rivers, streams and lakes will be found to be unmeasured and all such waters are recognized as the property of the State. There is thus no system of riparian proprietorship and private rights in water, such as prevails elsewhere. The waters of hill streams are commonly utilized for water mills, which are assessed to mill rents by Government as a charge for the use of the water, and for irrigation. Sanction to the establishment of a water mill and the assessment of such new mills to mill rent are matters dealt with executively. Once sanctioned a water mill becomes ordinary property of the owner and his heirs or transferees.

The only special local custom relating to disputes about water rights is that of prior user, which is a consequence of the conditions of State control and the absence of private ownership.

By this custom any man who utilizes the water of a stream till then running to waste, acquires a right to the amount of water actually needed for his reasonable requirements as against any later comer, who may wish to divert the supply for his own purposes. The right of the prior user, in case a dispute arises, is limited to the actual requirements of his operations up to that time. Thus a man who has constructed an irrigation channel and has been irrigating 5 acres of land cannot claim more water than is necessary for that area on the pretext that he intended to extend his irrigation to 10 acres later on.

The custom is well set forth and earlier rulings summarised in *Baga and others* v. *Ram Singh and others.*

Thokdari dues.—Thokdars in the hills were originally farmers of the revenue and usually landowners of leading families. They are now hereditary police officials of practically nominal functions and remunerated by dues consisting of a percentage on the revenue of the villages comprised in their thokdari. They are appointed and can be dismissed by the Commissioner. The only cases relating to them which come before the civil courts are concerned with their dues.

These dues are a salary or remuneration for their office and not private property ; hence they cannot be alienated nor can shares be claimed in them. In *Guman Singh* v. *Kushal Singh* it was held that a thokdar can bind himself to pay his dues to another person, but he cannot alienate them or bind his successor. Similarly, where a thokdar Daulat Singh, had mortgaged his dues, Rs. 62 per annum, in 1880 to one Sheo Ram as interest on a loan of Rs. 580 and this came to notice in 1898, the Commissioner dismissed Daulat Singh and abolished the thokdarship. The Board of Revenue (Messrs. Moule and Evans) wrote : "The duties performed by a thokdar may not be of much account, still it is clearly a service tenure and the rights and duties are personal to the thokdar and cannot be transferred by sale or mortgage to another." (Order dated October 14, 1898.) They placed Daulat Singh under suspension, giving him a year to redeem the mortgage.

26. *Temple lands.*—There are numerous villages in the hills assigned free of revenue to various temples ; these villages and

their lands are known as *gunth.* The assignment only includes the measured land and not the unmeasured waste and jungle, which remains the property of the State as elsewhere. This has been laid down on various occasions, and since *all* unmeasured waste lands in the hills were declared Government protected forests in 1893, the point can no longer be contested.

The various rights in these *gunth* lands require to be distinguished with some care. There is, firstly, the temple, acting through its chief priest or manager (*rawal, mahant, sirgiroh, pir* or *daroga*) and standing in the place of Government as overlord of the villagers and assignee of the revenue or nominal revenue. The interest of the temple cannot be alienated by any one (cf. *Durga Singh* v. *Salig Ram*).

Secondly, under the temple there are proprietors (hissadars) as in an ordinary village under Government. These hissadars are of two distinct classes.

The one class consists of cultivators who pay the assigned revenue or other dues, in cash or kind, to the temple.

The second class consists of priests, servants or other functionaries of the temple, who hold the land revenue-free in return for services rendered by them to the temple.

The various cases which occur in respect of these lands relate to the alienability or otherwise of these two classes of tenures. They obviously stand on very different footings.

In the first case it makes no difference to the temple who pays in the cash or other dues leviable from the cultivator. The latter can in such villages undoubtedly alienate his land ; these tenures are much the more common.

But in the second case, while a priest or functionary can eke out a subsistence on the produce of his two or three acres of cultivation, he could not live on the two or three rupees of revenue which at the usual hill rates the temple would receive from an outsider, if the land were sold to such a purchaser, nor could the temple maintain a priest or servant on the income from the land. If therefore a priest or other holder of a service tenure could alienate his holding the worship of the temple would cease and the object of the endowment would be defeated ; there would be a perversion of the endowment.

This principle is clearly applicable to sales of such holdings to outsiders, who cannot render the services on the performance of which the tenure depends, e.g. a sale by a Brahman priest to a Muhammadan or dom. Whether it would apply to a transfer to a purchaser who could equally well render the required service is a more debatable point.

There are various rulings on the subject of these service tenures. Unfortunately the records of the two oldest cannot be traced. They were evidently before Mr. Pauw who quotes them in his Settlement Report, 1896, and his extracts from them may be reproduced.

In *Kundan Lal Sah* v. *Panua*, *gunth* land held on a service tenure was attached in execution of a decree. The Senior Assistant Commissioner, Colonel Garstin, referred the case to Sir Henry Ramsay with the following report: "In my opinion where *gunth* land is in the possession of the *pujaris*, in return for which they are required to perform service in the temple, the land in their possession cannot be attached in satisfaction of their private debts. For, if it is auctioned, this service in the temple will fall on the purchaser and this cannot be performed by every caste . . . In villages in which the possession of the *gunth* land is not with the temple servants the temple authorities do not appear entitled to raise any objection to attachment." Sir Henry Ramsay passed the following order on this reference (13th June, 1878): "The opinion of the Senior Assistant Commissioner is correct. *Gunth* lands should not be attached in satisfaction of a private debt."

Again, in *Gulab Singh* v. *Ram Datt*, Mr. Giles, Senior Assistant Commissioner, wrote: "There are two kinds of *gunth* lands. Of one kind the *pujari* of the temple receives the profits as payment for his services to the temple. With such land a decree-holder against the *pujari* has, I conceive, no right of interference. But with respect to the other kind of *gunth* land, the temple stands in the place of Government with regard to ordinary revenue-paying land. Its assessment was fixed at settlement and the temple authorities have no power to alter it; nor so long as the revenue-payer meets the demand, have they any power of interference with him." This view was upheld on appeal by Colonel Erskine, Commissioner (December 18, 1890).

The third ruling in which a sale of such service-tenure land by a priest to an outsider was cancelled on a suit by the chief priest of the temple is *Padamgir* v. *Dulanath and another* (q.v.).

There are two later rulings which are often quoted as reversing the above decisions. These are *Amba Datt and another* v. *Daulat Singh* and *Kuna Sah* v. *Premua Rawal,* and they are both reproduced in this volume. A perusal of these cases will however show that they do not reverse the principal laid down above. In the latter case the Commissioner clearly did not understand the nature of the tenure, while the former decision could at most be held to approve such transfers in cases where the purchaser was equally competent to render the services required from the landholder.

The three earlier decisions appear undoubtedly to lay down the correct principle for such cases.

27. *Priestly rights.*—In view of the numerous temples and places of pilgrimage in the hills, it is natural that a good many disputes should occur with regard to succession to temple offices and priestly rights at places of pilgrimage. These however do not as a rule depend on principles of local custom, but have to be decided on the facts of the particular case. The succession to the rawalship of the two great temples of Badrinath and Kedarnath has been settled by schemes of management. An instance of a claim to exclude outsiders from admission to their body and to set up a monopoly of the right to collect offerings at a sacred spot, with an illustration of the usual issues in such cases will be found in the case of the *panch pandas* of Badrinath (*Musammat Sarda and another* v. *Lajja Ram and others).* See also paragraph 8 with regard to the succession to priestly rights. There have been many disputes between the *rawal* (or chief priest) of Kedarnath and the pandas of Kedarnath, a numerous and well-to-do body of (nominally) "eight *sayanas*" [or headmen] "and eighteen scores of pandas." In the most important case *Rawal Ganesh Ling v. The pandas of Kedarnath* (q. v.) the latter vindicated their right as spiritual guides of the pilgrims, to accompany them into the

temple and receive and retain gifts there. A similar case between the same parties (S. C. A. 15 of 1905, not reproduced) established their right in the same way to receive gifts at Guptakashi. While in a third case (S. C. A. 8 of 1907) *The Pandas v. Rawal Ganesh Ling and others* (not reproduced) the pandas failed to establish the exclusive right of their body to the posts of Samalia and Bhandari in the temple.

Most of these cases do not involve any special principles of law or local custom. Each temple has its own special usages, which have to be decided by the evidence in each case.

INDEX TO THE COMMENTARY.

[The references are to paragraphs, not pages.]

Paras.

Adoption .. 9
Alienation by members of joint family .. 10
Benap land .. 5, 23, 24
Bhai Bant .. 13
Biths .. 4
Brahmans .. 4, 12
Castes in the hills .. 4
Courts in Kumaun .. 3
Customs. Local—— .. 6
Daughters .. 11, 15
Dhant and *dhanti* .. 7, 12
Doms .. 4
Gharjawain .. 9, 15, 18
Gunth lands .. 26
Hindu Law .. 4, 6, 18
Illegitimacy .. 7
Illegitimate children .. 7, 12
Inheritance .. 7, 8, 9, 12, 13, 14, 15, 16
Jethon .. 14
Jogis .. 18
Joint family .. 10, 11
Khasias, Khas-Rajputs .. 4, 6, 7, 9, 12
Khas-Brahmans .. 4, 6, 7, 12
Kumaun Laws Bill .. 1
Land tenures .. 5
Levirate .. 8
Local opinion .. 1
Maintenance .. 11
Malguzar .. 5, 22
Marriage .. 7, 8, 12
Mawari Bant .. 22
Measured land .. 5, 23
Mitakshara Law .. 6
Naik caste .. 7
Nap land .. 5, 23
Nayabad grants .. 5, 23
Padhan .. 5, 22
Padhanohari land .. 22
Pandas .. 18, 27

Paras.

Partition 10, 11, 22
People of the hills 4
Pre-emption 20, 21
Priestly rights 18, 27
Prior user in water 24
Proof of custom 6
Punjab Customary Law 1, 8, 9, 12, 13, 14, 15, 19

Rajputs 4, 12, 15
Ramsay. Sir H.—— 2
Rattigan. Sir W.—— 9, 19
Reversioners 16
Rulings. Scarcity of—— 2
Rulings. Value of—— 2
Rulings. Classification of—— 3
Sautia Bant 11, 13
Service tenures 26
Shikmi co-sharer 10
Son-in-law. Adopted—— 9, 15, 18
Sons' inheritance. See also Illegitimate children 12, 13, 14
Tekua 8
Tenancy system 5
Temple lands 26
Thokdari dues 25
Tupper's *Punjab Customary Law* 1, 8, 9, 12, 13, 14, 15, 19

Unmeasured land 5, 23, 24
Unchastity. Widow's—— 19
Village community 16, 22
Village common land 22
Water. Rights in—— 24
Widow. Brother's—— 8
Widow's estate 8, 11, 19
Widow. Children by brother's—— 12
Woman's estate 16